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No. 03-182

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IN THE

Supreme Court of the United States

SHALER AREA EDUCATION ASSOCIATION,
Petitioner,

v.

F. NAYLOR EMORY, DENNIS A. ERB,
ROBERT K. GILBERT, JAMES W. LOSSELL,
BARBARA J. MCALLEY, and WESLEY S. SEMPLE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, as the Third Circuit held in conflict with the Ninth Circuit, this Court's decision in *Chicago Teachers Union v. Hudson* invariably requires a small local union, as a precondition for collecting a statutorily authorized "fair-share" fee from nonmembers whom it represents in collective bargaining, to submit audited financial statements—regardless of the local's size and the complexity of its financial transactions, and even if the cost of conducting such an audit would far exceed the amount of fair-share fees at stake.

2. Whether, if audited financial statements are not invariably required, petitioner fulfilled its obligation under *Hudson* to give its fair-share feepayers "sufficient information to gauge the propriety of the union's fee" by providing a statement of the prior-year expenditures on which its fee calculation was based, broken down into chargeable and nonchargeable categories, along with the opportunity to inspect the union's ledger of itemized expenditures from which the categorical breakdown was derived.

PARTIES

In addition to petitioner Shaler Area Education Association, the defendants/appellants/cross-appellees in the court below included the Pennsylvania State Education Association and the National Education Association. In addition to the respondents listed in the caption, Marsha Otto was a plaintiff/appellee/cross-appellant in the court below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Shaler Area Education Association respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 8, 2003, in *Otto v. Pennsylania State Education Ass'n*, 330 F.3d 125 (3d Cir. 2003).

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Third Circuit is reported at 330 F.3d 125, and is reproduced in the Appendix to this Petition ("App.") at 1a. The order of the Third Circuit denying rehearing en banc and granting panel rehearing is reported at 328 F.3d 715, and is reproduced at App. 26a. The initial opinion of the Third

Circuit, subsequently withdrawn, is reproduced at App. 29a. The opinion of the United States District Court for the Middle District of Pennsylvania is reported at 107 F. Supp. 2d 615, and is reproduced at App. 55a. The report and recommendation of the magistrate judge is reported at 161 L.R.R.M. (BNA) 2036, and is reproduced at App. 76a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was initially entered on April 3, 2003. A timely petition for rehearing was granted, the judgment and opinion of April 3 withdrawn, and an amended opinion issued, on May 8, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATEMENT OF THE CASE

Petitioner Shaler Area Education Association ("SAEA") is a typical small public-sector local union. SAEA has 344 members and annual revenues of $22,000 derived entirely from dues and fees. The union has no employees but is governed and administered entirely by volunteer member-officers—full-time teachers employed in the bargaining unit—who are elected by their fellow members.

SAEA acts as the exclusive bargaining representative for 355 educators employed by the Shaler Area School District. As authorized by the Pennsylvania Public Employe Fair Share Fee Law, 71 Pa. Stat. Ann. § 575, the collective bargaining agreement between SAEA and the school district contains a provision pursuant to which bargaining-unit

educators who opt not to join the union are required to pay a fair-share fee (also called an "agency fee") to offset their pro rata share of the union's costs of representation.

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), this Court ruled that unions entitled to a fair-share fee must, as a first step in securing payment, provide the nonmember feepayers with "an adequate explanation of the basis for the fee." *Id.* at 310. SAEA and its state and national affiliates, the Pennsylvania State Education Association ("PSEA") and the National Education Association ("NEA"), annually send to each feepayer a "Notice to Fair Share Feepayers"—commonly referred to as the "*Hudson* notice." This notice sets out the amount of the fair-share fees assessed by SAEA, PSEA, and NEA, explains how each of the unions calculated that amount on the basis of its prior-year expenditures, and informs the feepayer of the procedures through which she can challenge the amount of the fee.[1]

The *Hudson* notice contains PSEA's and NEA's audited statements of their chargeable and nonchargeable expenditures for the previous school year. The notice also contains (i) SAEA's unaudited statement of its prior-year expenditures, broken down into eleven categories of chargeable and six categories of nonchargeable expenditures; (ii) SAEA's

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[1] This Court has held that the First Amendment prohibits unions from charging fair-share feepayers, over their objection, for the portion of union dues that goes for activities not germane to the union's collective bargaining function. *See generally Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991). SAEA, like other unions, therefore calculates its fair-share fee by determining which of its activities are chargeable and which are nonchargeable to objecting feepayers, and calculating the percentage of its prior-year expenditures that went for the former. That percentage, applied to the union's regular membership dues, yields the fair-share fee constitutionally chargeable to objecting nonmembers. (By statute, Pennsylvania limits the fair-share fee for *all* public-sector feepayers in a way that is roughly equivalent to the constitutional limitation for objectors. *See* 71 Pa. Stat. Ann. § 575(a).)

budget for the current year; and (iii) an invitation to SAEA feepayers to inspect SAEA's ledger of prior-year expenditures on which its fee calculation is based.

The plaintiffs-respondents were, during the 1994-95 and 1995-96 school years, SAEA-represented bargaining-unit educators but not members of the union. They brought this litigation as a class action under 42 U.S.C. § 1983 challenging the fair-share fees assessed by SAEA, PSEA, and NEA. In their complaint the plaintiffs alleged *inter alia* that SAEA's fair-share fee was unconstitutionally assessed because its *Hudson* notice did not contain an audited statement of SAEA's prior-year expenditures on which the fee calculation was based. The district court's jurisdiction was predicated on 28 U.S.C. §§ 1331 and 1343.

After the district court denied class certification, the parties agreed to a partial settlement that resolved all claims for damages, as well as all claims for declaratory and injunctive relief except with respect to three discrete legal questions, including the one at issue here. The parties also agreed to a stipulation of facts as the basis for litigating the three remaining issues on cross-motions for summary judgment. On July 3, 2000, Senior Judge Muir, adopting the recommendation of the magistrate judge, *see* App. 76a-90a, granted summary judgment in favor of plaintiffs on the issue presented here, holding "that the constitution requires Shaler Area Education Association to provide nonmembers a financial statement of its expenses that has been audited." App. 66a.

A panel of the Third Circuit affirmed this portion of the district court's judgment. App. 35a-42a. The court held "that every union collecting fair-share fees from non-members must subject its disclosed financial information to independent auditor verification," App. 38a, through "audits of their financial statements." App. 39a.

SAEA petitioned for rehearing, bringing to the Third Circuit's attention the intervening decision in *Harik v. California Teachers Ass'n*, 326 F.3d 1042 (9th Cir. 2003), *petition for cert. filed sub nom. Sheffield v. Aceves* (No. 03-89) (docketed July 16, 2003), in which the Ninth Circuit held that a small local union—one much like SAEA—was not required by *Hudson* to make its disclosure through audited financial statements to the exclusion of other alternatives.

Over the dissenting votes of Chief Judge Becker and Judge Nygaard, the full Third Circuit denied rehearing *en banc*. The panel, without changing the result, granted rehearing, vacated its previous opinion, and issued an amended opinion. App. 26a-28a.

In its revised opinion, the Third Circuit analyzed and stated its disagreement with the *Harik* decision, App. 8a-11a, explaining that while "something less rigorous for small local unions than independent auditor verification" might well be appropriate were it "writing on a clean slate," App. 11a, consideration of any such alternative was foreclosed by this Court's decision in *Hudson*. *Id.*

REASONS FOR GRANTING THE WRIT

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 (1986), this Court held that a union that assesses members of a represented bargaining unit a fair-share fee must, in order to enable the feepayers to make an informed determination on whether to challenge the amount of the fee, provide them with "sufficient information to gauge the propriety of the union's fee."

In decisions only weeks apart, the Ninth Circuit—in *Harik v. California Teachers Ass'n*, 326 F.3d 1042 (9th Cir. 2003), *petition for cert. filed sub nom. Sheffield v. Aceves* (No. 03-89) (docketed July 16, 2003)—and the third Circuit, in the instant case, came to diametrically opposed answers to the

following question: Whether small local unions like SAEA—a local teachers' union with some 350 members and $22,000 in annual income—can *only* meet the *Hudson* disclosure requirement by providing feepayers with fully audited financial statements, and not in any other manner.

In *Harik*, the Ninth Circuit read *Hudson* to permit a small local union to "provide its feepayers with *either* the full financial material necessary to verify, *or* an independently sanctioned verification of, the local union's chargeable and non-chargeable expenditures," explaining that "providing financial reports along with full and fair access to bills, check stubs, canceled checks, account balances, and related materials may be more cost-efficient than an external review." 326 F.3d at 1049 (emphasis added).

In the instant case the Third Circuit held, to the contrary, that *Hudson* mandates that "local unions, regardless of their size, are required to obtain audits of their financial statements." App. 13a.

While the conflict between these Third and Ninth Circuit decisions is the most obvious manifestation of the lower courts' confusion over what *Hudson* requires, that is not the full extent of the division over this question. The two state appellate courts that have addressed the exact question presented here are similarly divided. *See Wareham Educ. Ass'n v. Labor Relations Comm'n*, 713 N.E.2d 363 (Mass. 1999); *Whitley County Teachers Ass'n v. Bauer*, 718 N.E.2d 1181, 1191-92 (Ind. Ct. App. 1999) (discussed *infra* pp. 12-13). And, in addressing a closely analogous question two circuits and one state appellate court have rejected the Third Circuit's reading of the *Hudson* disclosure requirement. *See Browne v. Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 393-94 (Wis. 1992); *Thomas v. NLRB*, 213 F.3d 651 (D.C. Cir. 2000); *International Ass'n of Machinists v. NLRB*, 133 F.3d 1012, 1016-18 (7th Cir. 1998) (discussed *infra* pp. 13-15).

This is a conflict that only this Court can resolve and that urgently calls for this Court's attention.

First, the conflict among the lower courts has not been generated by differing views on whether audited financial statements are necessary to provide feepayers with proper disclosure or are otherwise required by the legal principles governing the agency fee system outlined in *Hudson*.

The conflict is, rather, the product of the lower courts' disagreement over how to read *Hudson*—specifically whether the *Hudson* Court's discussion of the disclosure requirement, 475 U.S. at 306-07 & n.18, is properly understood as an across-the-board mandate of audited financial statements in every circumstance.

Only this Court can state with authority what its *Hudson* opinion means in this regard. And, only this Court is entirely free to do so by focusing on the merits question of what kind of disclosure properly effectuates *Hudson*'s purpose of "devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 302.

Second, the question raised by this petition is one that has the most direct and serious impact on thousands of local unions.

The Third Circuit's decision threatens the ability of small local unions in Pennsylvania, New Jersey, and Delaware to collect any fair-share fee at all. As a result of the injunction entered by the trial court—which prohibits SAEA from collecting fair-share fees from plaintiffs without providing them with an independent auditor's verification of SAEA's calculation of those fees—SAEA has been forced to suspended collection of its fair-share fees.

The same is true of nearly all of the other local unions—the vast majority of which have fewer than 400 members—affiliated with the Pennsylvania State Education Association (which advised its affiliated locals to comply with the injunction's terms). Of PSEA's 603 locals that have bargained fair-share provisions, only 16 were able to obtain an audit and to collect their fair-share fees during the 2002-03 school year.

The hundreds of small local affiliates of other unions within the Third Circuit's jurisdiction will also be subject to the same constraint, if the decision here is not reviewed and reversed.

Beyond the jurisdictions covered by the Third Circuit's holding, small local unions in other jurisdictions will suffer from the legal uncertainty as to *Hudson*'s requirements created by the conflicting lower court decisions. The National Education Association alone has over 7,000 affiliated local unions of fewer than 400 members in the 19 states that have public-sector agency fee statutes. And NEA, of course, charters only a fraction of the local unions in the country entitled to negotiate fair-share provisions.

All of these local unions will be faced with a stark choice if this Court declines to clarify its *Hudson* opinion: the local can either acquiesce in the Third Circuit's holding and cease its collection of agency fees where the audit costs outrun the collectible fees; or the local can continue to proceed by making other forms of verifiable disclosure not involving an audit, at the risk of highly expensive litigation.

Given the lower courts' division on how to read the *Hudson* disclosure requirement, given the importance of that requirement in the effectuation of the overall agency fee system, and given the serious effect of the conflict on many thousands of local unions, the Court should grant review

to provide an authoritative answer to the question that has confounded the lower courts and that is presented by this petition.

I.

The constitutionality of legislation allowing a public-sector union to collect a fair-share fee from nonmember employees whom the union represents in collective bargaining is well established—as is the nonmember's First Amendment right to object to paying for political and other expenditures not germane to the union's collective bargaining function. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991).

In *Hudson*, *supra*, this Court established certain prophylactic requirements intended to ensure that collection of the fair-share fee does not impair the nonmember's First Amendment right to refuse to pay for "nonchargeable" union expenditures. In particular, *Hudson* required that nonmembers "be given sufficient information to gauge the propriety of the union's fee," 475 U.S. at 306, in order to permit the nonmember to make an informed decision about whether to accept the union's calculation of its fair-share fee or to exercise her right under *Hudson* to challenge the fee before an independent decisionmaker.

In a footnote elaborating on this requirement the Court observed that the petitioner union there—a 27,000-member union with annual revenues exceeding $4.1 million—was not required to provide "an exhaustive and detailed list of all its expenditures," but that "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *Id.* at 307 n.18.

The question presented by this petition is whether *Hudson*'s requirement that unions disclose "sufficient information to gauge the propriety of the union's fee" requires a small

local union—like the 350-member SAEA with annual revenues of some $22,000—to provide its *Hudson* disclosure through audited financial statements.

Rather than obtaining an auditor's verification of its financial statements—at a cost of over $1,000, which would be more than twice the total of $495 due from its eleven nonmember feepayers, *see* App. 80a-81a—SAEA has attempted to fulfill its disclosure obligation under *Hudson* in two ways.

First, SAEA prepares from its ledger of itemized expenditures an unaudited breakdown of its actual prior-year expenditures in eleven categories of chargeable and six categories of nonchargeable activities, which it provides to its feepayers as part of its annual *Hudson* notice.[2]

Second, SAEA supplements this statement of its major categories of chargeable and nonchargeable expenditures by offering its feepayers the opportunity to inspect its ledger of itemized expenditures from which the categorical breakdown is derived and on which SAEA's fee calculation is based.

SAEA's contention is that, in the context of a small local union whose financial records are neither complex nor extensive, such disclosure is well tailored to providing fair-share feepayers with "sufficient information to gauge the propriety of the union's fee," 475 U.S. at 306, as *Hudson* requires.

II.

A. As noted above, the Third Circuit in this case and the Ninth Circuit in *Harik* reached diametrically opposed answers to the question of what *Hudson* requires of small local unions by way of disclosure.

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[2] While this statement of expenditures was not heretofore attested to by a local union officer under penalty of perjury, SAEA represented to the court below its intent to provide such sworn verification in future years.

Harik involved a teachers' union whose size and circumstances were substantially identical in all relevant respects to those of SAEA, and which attempted to satisfy its disclosure obligation under *Hudson* in much the same way as does SAEA—by providing feepayers with a sworn, but unaudited, statement of the major categories of its chargeable and nonchargeable expenditures, supplemented by an invitation to inspect the union's checkbook and cancelled checks. 326 F.3d at 1047.[3]

The Ninth Circuit held that audited financial statements were not required under these circumstances:

> For the smallest affiliates, providing financial reports along with full and fair access to bills, check stubs, canceled checks, account balances, and related materials may be more cost-efficient than an external review; we need not dictate the particular procedure as long as it is sufficiently reliable to ensure that a nonmember can independently verify that the union spent its money where it claimed that it did.

Id. at 1049.

The Ninth Circuit's holding is squarely in conflict with the Third Circuit's holding in this case that, in order to comply with *Hudson*'s disclosure requirement, "local unions, regardless of their size, are required to obtain audits of their financial statements." App. 13a.

These two recent court of appeals decisions, decided on facts that cannot be distinguished in any meaningful way,

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[3] While the Ninth Circuit's opinion does not provide specific information about Dinuba Teachers Association ("DTA"), the record in that case reveals that during the relevant school year DTA had 231 members and revenue of about $29,000, that it employed no professional staff, that it collected just over $600 in agency fees from its seven nonmembers, and that the cost of an audit would have been $2,800. Supplemental Excerpts of Record 109, 134-36, 173, Case No. 01-15590 (9th Cir.).

thus present an irreconcilable conflict with respect to the application of *Hudson*'s disclosure requirement to small local unions.

B. Two state appellate courts, both applying federal law, have also addressed the question whether small local unions can meet *Hudson*'s requirements by providing feepayers with complete, albeit unaudited, disclosure of the expenditures that constitute the basis for the union's fair-share fee. Like the Ninth and Third Circuits, these state courts are equally divided on the question.

In line with the Third Circuit, the Massachusetts Supreme Judicial Court has answered the question in the negative, holding flatly that a small local union "must accompany any demand for agency fees with an independently audited verification of its major expenses." *Wareham Educ. Ass'n v. Labor Relations Comm'n*, 713 N.E.2d 363, 368 (Mass. 1999). Like the Third Circuit, the Massachusetts court concluded that *Hudson*'s reference to verification by an independent auditor controlled and that any other form of disclosure was insufficient. *Id.* at 367-68.

The Massachusetts court reached that conclusion in a case involving three local unions that represented bargaining units ranging from 116 to 205 employees, with annual expenditures of between $9,400 and $29,000. The one to seven non-members in those bargaining units were charged agency fees of no more than $45. *Id.* at 365. The unions provided their feepayers with breakdowns of their major categories of chargeable and nonchargeable expenditures, sworn to under penalty of perjury, and they offered the feepayers in addition the opportunity either to obtain an itemized listing of all of their local's expenditures or to examine personally the union's expenditure records. *See id.* at 364-65; *Wareham Educ. Ass'n*, 24 Mass. Labor Cases 23 (Mass. Labor Rel. Comm'n 1997). The Massachusetts court rejected that form of disclosure as inconsistent with *Hudson*, requiring the

unions instead, as a condition for continuing to collect agency fees, to obtain audited statements of their expenditures—at a projected cost for each local of between $2,200 and $4,100. 713 N.E.2d at 366.

The Indiana Court of Appeals reached the opposite conclusion, holding—in a case involving a small local union with an annual budget of under $3,500—that audited financial statements were not required under the circumstances. *Whitley County Teachers Ass'n v. Bauer*, 718 N.E.2d 1181, 1191-92 (Ind. Ct. App. 1999). The court explained that *Hudson*'s reference to "verification by an independent auditor" was "justified in that case 'by that particular union's size and the amount of money involved.'" *Id.* at 1192.

C. The Third Circuit's holding that that a small local union can never satisfy its *Hudson* disclosure obligation in any way other than through audited financial statements also conflicts with multiple decisions of other courts that have upheld, under *Hudson*, forms of local-union financial disclosure that did not include an independent audit of the local's expenditures.

Two well-reasoned decisions have accepted the use of a "local presumption," under which the local unions do not provide feepayers with any actual expenditure information—audited or not—and instead rely on an empirically supported presumption that the chargeable portion of their expenditures is greater than the chargeable portion of the parent union's expenditures (as shown on the parent union's audited financial statements).

The Wisconsin Supreme Court has approved the use of an empirically based local presumption in the public sector, holding that *Hudson* does not require an audit of every local union's expenditures. *Browne v. Wisconsin Employment Relations Comm'n*, 485 N.W.2d 376, 393-94 (Wis. 1992).

More recently, the D.C. Circuit upheld reliance on an empirically supported local presumption in the private sector, *Thomas v. NLRB*, 213 F.3d 651 (D.C. Cir. 2000), holding that "petitioners[']conten[tion] that the use of a local presumption can never be squared with *Hudson*" "rests on a reading of *Hudson that this circuit has rejected*." *Id.* at 659-60.[4]

The Seventh Circuit's decision in *International Ass'n of Machinists v. NLRB*, 133 F.3d 1012, 1016-18 (7th Cir. 1998)—which approved a system of financial disclosure under which the local unions' statements of expenditures were "audited" by lay employees of the parent union—also conflicts with the Third Circuit's holding that nothing other than an audit by an independent accountant can ever satisfy a union's disclosure requirement under *Hudson*.

While *Thomas* and *Machinists* were National Labor Relations Act cases, the courts focused their analysis on whether the challenged disclosure was in conformity with the *Hudson* requirements which—in both the D.C. Circuit and the Seventh Circuit—govern NLRA cases by analogy. *See Thomas*, 213 F.3d at 658 ("Although *Hudson* involved constitutional concerns, this court has applied the basic protections of *Hudson* to the *Beck*-defined DFR cases involving private sector employees."); *Machinists*, 133 F.3d at 1017 (while *Hudson* was a constitutional rather than a statutory case, "[i]t is not obvious why this should make a difference").

Browne, *Thomas*, and *Machinists* thus all stand for the proposition that *Hudson* does not invariably require small

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[4] By contrast, reliance on an *unsupported* local presumption has generally been held insufficient to meet *Hudson*'s disclosure requirements. *See Hohe v. Casey*, 956 F.2d 399, 410 (3d Cir. 1992); *Prescott v. County of El Dorado*, 177 F.3d 1102, 1108 (9th Cir. 1999), *vacated*, 528 U.S. 1111, *reinstated in pertinent part*, 204 F.3d 984 (9th Cir. 2000); *see also Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 430-31 (6th Cir. 1990) (striking down a local presumption that went beyond an evidentiary assumption and purported to bind the independent arbitrator).

local unions to provide financial statements verified by an independent auditor as the only possible way of making adequate disclosure. They are, in short, irreconcilable with the Third Circuit's holding in this case, and that of the Massachusetts court in *Wareham*, that a local union, regardless of its size and circumstances, can only satisfy *Hudson*'s disclosure requirement through audited financial statements.

III.

What is particularly striking about the decision below—and the *Wareham* decision in Massachusetts—is the absence of any reasoned justification for an audit requirement that threatens to render collection of any fair-share fee prohibitively expensive for small locals like SAEA. In point of fact, what divides the lower courts is not any debate about what kind of financial disclosure requirement for small locals serves the overall agency fee procedural system set out in *Hudson*, but only disagreement about the extent to which the courts are bound by this Court's reference, in *Hudson*'s footnote 18, to "verification by an independent auditor."

The Ninth Circuit in *Harik* accepted the proposition that there could be more "cost-efficient" ways than an audit for small local unions to provide feepayers with proper information that would permit them to make an informed decision about whether to challenge the fair-share fee. 326 F.3d at 1049. Acknowledging that view, the Third Circuit implied its agreement: "Were we writing on a clean slate, we might well require something less rigorous for small local unions than independent auditor verification." App. 11a. But the Third Circuit believed its hands to be tied by *Hudson*:

> But the slate is not clean. We are bound by the Supreme Court's decision in *Hudson*, and its directive of "verification by an independent auditor" means just that. *Hudson* implied no intent to make the audit requirement

> depend on the size of the reporting union. Absent a counter directive by the Supreme Court, we likewise make no exception.

Id.

It is very much to the point that the Third Circuit did not offer any reason why providing audited financial statements was the only way in which a small local union like SAEA—a local with few members and limited expenditures—could give feepayers "sufficient information to gauge the propriety of the union's fee." *Hudson*, 475 U.S. at 306. The same is true of the *Wareham* decision that reached the same result. *See* 713 N.E.2d at 367-68. In both cases, the court's only justification for its holding was *Hudson*'s reference, 475 U.S. at 307 n.18, to "verification by an independent auditor."

Nor is any other rationale readily apparent. As we have noted, the Chicago Teachers Union—the union party in *Hudson*—had some 27,000 members, annual revenues exceeding $4.1 million, a substantial staff, a wide range of expenditures, and, of necessity, complex financial books and records. It is safe to assume that such an organization would routinely obtain an annual audit of its expenditures, and it is equally clear that a rank-and-file nonmember, even if given full access to the union's books, would be overwhelmed by the task of verifying that the union's statement of its "major categories of expenses" accurately captured its expenditures in each category. It was, therefore, unsurprising for the *Hudson* Court to opine that—in the context of a union of this size—"adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." 475 U.S. at 307 n.18.

But that does not mean that nothing short of audited financial statements can be adequate disclosure in the context of a small organization with no employees, a $22,000 annual budget, and a financial ledger recording its expenditures. As the Ninth Circuit held in *Harik*, a small local union can

provide feepayers with sufficient information to gauge the propriety of its fee *either* through audited financial statements *or* by giving its feepayers "the full financial material necessary to verify . . . the local union's chargeable and non-chargeable expenditures." 326 F.3d at 1049. Thus, as the *Harik* court put it, a small local's disclosure obligation could be met by "providing financial reports along with full and fair access to bills, check stubs, canceled checks, account balances, and related materials." *Id.*

This form of financial disclosure is eminently well suited to small local unions like SAEA, whose expenditures are sufficiently few in number that an interested feepayer can, in essence, be given the union's checkbook and allowed to see for herself what the union's money went for. SAEA's statement of its major categories of expenditures is compiled from materials that essentially speak for themselves, which local-union feepayers can understand. The relative simplicity and transparency of these financial records can afford feepayers a reasonable measure of assurance that the union's funds went for the purposes described in the union's statement of its major categories of expenditures.

Indeed, it is hardly too much to suggest that the typical feepayer, who may be unfamiliar with audited financial statements, may well derive a *better* understanding of the local union's expenditures from this kind of financial disclosure than from a formal auditor's report. *Cf. Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir. 1989) (suggesting that an agency fee notice "as long and complicated as an SEC prospectus" does not necessarily serve the interests of feepayers).

The recognition that alternative forms of verification can be appropriate in the case of small organizations is hardly a novel one. It is, in fact, commonplace for governmental audit requirements to be waived or relaxed for smaller entities, where the cost of an audit is often disproportionate to what is

at stake.[5] It may be the case, as the Third Circuit observed, that "an audit 'make[s] assurance double sure,'" App. 13a (quoting Shakespeare), but to apply that principle blindly without regard to the balance between the additional cost of such a requirement and the additional value, if any, to be gained from that requirement makes little sense. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (looking, in the due process context, to "the probable value, if any, of additional or substitute procedural safeguards").

As the Financial Accounting Standards Board has explained in its Statements of Financial Accounting Concepts, "[t]here are usually alternative ways of handling an issue," and it is fully appropriate to consider whether "one of them [is] less costly and only slightly less effective." Financial Accounting Standards Board, *Statements of Financial Accounting Concepts* 83 (2002) (Statement of Financial Accounting Concepts No. 2, ¶ 143). Thus, "[i]n order to justify requiring a particular disclosure, the perceived benefits to be derived from that disclosure must exceed the perceived costs associated with it." *Id.* at 32.

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[5] For example, federal regulations requiring audits of nonprofit recipients of federal funds exempt from that requirement entities that expend less than $300,000 a year in federal awards. Audits of States, Local Governments, and Non-Profit Organizations, 62 Fed. Reg. 35278, 35291 (June 30, 1997). Similar examples culled from Pennsylvania law include the following: 10 Pa. Stat. Ann. § 162.5(f) (exempting from audit requirement charitable organizations receiving contributions of less than $50,000, and allowing "review" instead of audit for those with contributions of less than $125,000); 15 Pa. Cons. Stat. § 7536(b) (allowing audits of agricultural cooperatives with sales of less than $100,000 to be performed by non-CPA members of the association); 20 Pa. Cons. Stat. § 3531 (allowing distribution of decedents' estates of less than $25,000 without formal proceedings including audit); 66 Pa. Cons. Stat. § 516(a) (requiring audits of utilities, but only if plant value exceeds $10 million); 68 Pa. Cons. Stat. § 3320(9) (allowing declarant's warranty rather than audit of condominium associations of less than 12 units).

Consideration of the relative costs and benefits of alternative forms of financial disclosure in these circumstances is particularly appropriate in view of the limited purpose of the financial disclosure *Hudson* requires. Disclosure of the union's major categories of expenditures is not a matter of proving the union's entitlement to the fee it seeks. That step comes later, when—if any feepayer challenges the fee—the union is required to prove to an independent decisionmaker its entitlement to the amount of the fee it has assessed. *See Hudson*, 475 U.S. at 307-08. The purpose of the disclosure requirement is simply to enable the feepayer to make an informed decision about whether to accept the union's calculation of its fair-share fee or exercise her right to challenge the fee before an independent decisionmaker. *See Wareham*, 713 N.E.2d at 368; *Dashiell v. Montgomery County*, 925 F.2d 750, 756 (4th Cir. 1991).

The feepayer deciding whether to take the step of challenging the fee is contemplating an act that—in contrast to many other endeavors undertaken in reliance on audited financial statements—is virtually cost-free and risk-free: if in doubt, the feepayer need only file her challenge, which costs nothing but a 37-cent stamp. As the Seventh Circuit has noted, "mounting a challenge is for all practical intents and purposes free." *Gilpin*, 875 F.2d at 1316.[6] The suggestion that feepayers of a small local union like SAEA can *only* be given sufficient information for that purpose through audited financial statements is inconsistent with the limited purpose of the disclosure requirement.

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[6] By filing a challenge, the feepayer becomes a party to the annual *Hudson* arbitration of fair-share fee challenges. While the arbitrator's decision is binding on the union, it does not preclude the feepayer from challenging the fair-share fee on a *de novo* basis in court. *Hudson*, 475 U.S. at 308 n.21; *Bromley v. Michigan Educ. Ass'n*, 82 F.3d 686, 691-95 (6th Cir. 1996). Thus, filing a challenge to the fair-share fee neither costs the feepayer anything nor has any adverse effect on her litigation options.

It is also inconsistent with the emphasis in this Court's agency fee cases on striking a balance between the competing interests involved. *Abood*, 431 U.S. at 237, *Hudson*, 475 U.S. at 302. Reading *Hudson*'s dicta as invariably requiring audited financial statements even in the case of the smallest local unions is not only unnecessary to protect the interests of feepayers; it would impose heavy transaction costs on small locals with limited resources.

The difficulty is readily apparent on the stipulated facts of this case, where the cost to SAEA of obtaining an audit would be more than twice the amount of the total fair-share fees SAEA could collect from its 11 nonmembers. It should not be surprising, therefore, that as a result of the district court's injunction, affirmed by the Third Circuit, SAEA and almost all of its sister locals in Pennsylvania have been obliged to forgo their statutory and contractual right to collect fair-share fees from the nonmembers they represent—contrary to this Court's stated goal of protecting the interests of feepayers "without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Hudson*, 475 U.S. at 302.

A small local union like SAEA can, in short, meet *Hudson*'s disclosure requirement in ways that are more "cost-efficient than an external review." *Harik*, 326 F.3d at 1049. For such a union, requiring an audit by an independent accountant serves only to drive up the union's transaction costs to the point at which collecting any fair-share fee becomes prohibitively expensive. Courts that have nonetheless required such an audit—the Third Circuit in this case, and the Massachusetts Supreme Judicial Court in *Wareham*—have cited no reason for doing so other than their reading of *Hudson*. It is important, therefore, that the Court revisit this issue and clarify the disclosure requirement it articulated in *Hudson*.

IV.

As noted above, literally thousands of small local unions are seriously impacted by the decision of the Court below—either because they are directly bound by the Third Circuit's decision, or because of the chilling effect that flows from the legal uncertainty engendered by the conflicting decisions of the Third and Ninth Circuits. It is urgent that this Court resolve that legal uncertainty by granting review to clarify *Hudson*'s disclosure requirement as applied to small local unions like SAEA.

This case is a fully appropriate vehicle for that review. The facts are undisputed, indeed stipulated; the legal issue is squarely presented; no jurisdictional problem or extraneous legal issue would prevent the Court from reaching this issue; and counsel on both sides are highly experienced in the law of agency fee and have litigated the issue presented here in multiple cases. The issue has been fully ventilated in the lower courts, and this Court should now decide it.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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August 1, 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed May 8, 2003]

No. 01-3858

MARSHA OTTO; F. NAYLOR EMERY; DENNIS A. ERB; ROBERT K. GILBERT; JAMES W. LOSSELL; BARBARA J. MCALLEY; WESLEY S. SEMPLE, On behalf of themselves and all other non-members similarly situated,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION-NEA; NATIONAL EDUCATION ASSOCIATION; SHALER AREA EDUCATION ASSOCIATION, On behalf of themselves and all other local associations similarly situate,

Appellants,

No. 01-4110

MARSHA OTTO; F. NAYLOR EMERY; DENNIS A. ERB; ROBERT K. GILBERT; JAMES W. LOSSELL; BARBARA J. MCALLEY; WESLEY S. SEMPLE, On behalf of themselves and all other non-members similarly situated,

Appellants,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION-NEA; SHALER AREA EDUCATION ASSOCIATION, On behalf of themselves and all other local associations similarly situated; NATIONAL EDUCATION ASSOCIATION; GROVE CITY AREA EDUCATION ASSOCIATION; JANE CAMPBELL; BARBARA LEIBY

Appeal from the United States District Court
For the Middle District of Pennsylvania
(D.C. Civil Action No. 96-cv-01233)
District Judge: Honorable Yvette Kane

Argued June 27, 2002
Before: AMBRO and STAPLETON, *Circuit Judges*, and O'NEILL,* *District Judge*

OPINION OF THE COURT

AMBRO, *Circuit Judge*:

We consider whether, under the First Amendment, certain expenses incurred by unions may be charged to non-members and whether a local union must obtain independent auditor verification of its charges (and, if so, what kind of verification we require).

The First Amendment affords public-sector employees the freedom not to associate with a labor organization. *See Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 301, 89 L. Ed. 2d 232, 106 S. Ct. 1066 (1986) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977)). There are limits to this constitutional freedom, however, in light of organized labor's important role in advancing employment conditions. *Abood*, 431 U.S. at 225-26. Thus, as a means of curing the so-called "free-rider" problem posed by its representation of non-members, a union may charge each non-member employee a fair-share, or agency, fee equal to his or her *per capita* share of the union's expenses arising from its duties as a collective-

* Honorable Thomas N. O'Neill, Jr., United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

bargaining representative. *See id.* at 235-36. But a union may not, consistent with the First Amendment, collect fair-share dues to support ideological causes or other expenses insufficiently related to collective bargaining. *Id.*

To ensure that non-members are assessed only for fair-share fees properly chargeable to them, the Supreme Court has ruled that unions must adopt procedural safeguards "carefully tailored to minimize the [First Amendment] infringement." *Hudson*, 475 U.S. at 303. First, the union must provide a non-member with "sufficient information to gauge the propriety of the union's fee." *Id.* at 306. This explanation of the basis for the fee is often referred to as a "*Hudson* notice." Second, a non-member must have an adequate opportunity to object to the fair-share fee allocation. *See id.* at 307. The two safeguards are linked; without the Hudson notice, a non-member would lack a basis for deciding whether to object to a fair-share fee calculation. *Penrod v. NLRB*, 340 U.S. App. D.C. 171, 203 F.3d 41, 46 (D.C. Cir. 2000).

When theory meets practice, questions abound. Do the financial information requirements apply to small local unions? How much verification of that information must there be? When a union represents more than one bargaining unit, can that union include, in the fair-share fee assessed to non-members of one bargaining unit, costs associated with another bargaining unit's litigation? What if those bargaining units are in different industries?

I. Background and Procedural History

Shaler Area Education Association ("SAEA") is the exclusive bargaining representative for education professionals employed by the Shaler Area School District. SAEA is the local affiliate of the Pennsylvania State Education Association ("PSEA")—which represents, *inter alia*, both education and healthcare professionals in the Common-

wealth—and the National Education Association ("NEA," and collectively with SAEA and PSEA, the "Unions"). During the 1994-1995 school year, the Shaler Area School District employed 355 education professionals, 344 of whom were members of the SAEA (and, thereby, the PSEA and NEA). Because all three Unions provide collective-bargaining services to the plaintiffs' bargaining unit, the eleven non-members paid fair-share fees to the SAEA, PSEA, and NEA pursuant to 71 Pa. Stat. Ann. § 575 (West 2003).

Seven non-union education professionals brought this 42 U.S.C. § 1983 [1] action to challenge the Unions' fair-share fee procedure and assessments.[2] After the District Court confirmed that the plaintiffs had standing to object to the fair-share fees and the sufficiency of the Unions' *Hudson* notice,[3] the parties filed a joint stipulation of facts followed by cross-motions for summary judgment. The District Court granted partial summary judgment in favor of the plaintiffs, declaring that the SAEA must verify its expenditures through an

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[1] 42 U.S.C. § 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

[2] Six of the named plaintiffs are members of the SAEA-represented bargaining unit. The seventh, Marsha Otto, is a member of the bargaining unit represented by the Grove City Area Education Association ("GCAEA"). While GCAEA was a defendant in the original complaint, it was dismissed from the action in plaintiffs' amended complaint.

[3] However, the District Court held that, because the plaintiffs did not use the Unions' arbitration process, they lacked standing to challenge the timeliness of that process. *Otto v. Pa. State Educ. Ass'n-NEA*, 950 F. Supp. 649, 651-52 (M.D. Pa. 1997).

independent audit and that PSEA[4] could not charge the plaintiffs for expenses incurred in litigation not relating specifically to the plaintiffs' own collective-bargaining unit. However, it also held that the Unions could assess education-professional plaintiffs for non-litigation expenditures related to the Unions' representation of healthcare professionals.

Both parties appealed, and together they present four issues for our review: (1) whether, by filing their complaint, plaintiffs objected properly to the Unions' fees and procedures; (2) whether a local union, regardless of size, must obtain an independent auditor verification of the expenditures listed in its fair-share calculation notice (and, if so, we need to decide at what level of auditor inquiry); (3) whether a union may charge non-members for collective-bargaining-related litigation costs incurred on behalf of another bargaining unit pursuant to an expense-pooling arrangement with that other bargaining unit; and (4) whether a union may charge non-members for pooled resources available to all local affiliates even though some of the affiliates represent employees in different professions. We rule in favor of plaintiffs as to issues one and two (and determine the level of verification required) and the Unions on issues three and four.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. We exercise appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Whether plaintiffs properly objected to the Unions' fair-share fee calculation is a question of standing and is subject to *de novo* review. *In re RFE Indus., Inc.*, 283 F.3d 159, 163 (3d Cir. 2002). We also review *de novo* the District Court's grant of summary judgment. *Cloverland-Green*

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[4] The District Court's order refers to PSEA and NEA, though it appears that the Unions argue in their briefing only as to PSEA.

Spring Dairies, Inc. v. Pa. Milk Mktg. Bd., 298 F.3d 201, 210 (3d Cir. 2002).

III. Discussion

A. Objection Requirement

The Unions contend that plaintiffs failed to carry their burden of objecting to the fair-share fee calculation by not raising a "contemporaneous objection," *i.e.*, by not objecting at the time of fee collection. Addressing this issue as a question of plaintiffs' standing to sue, the District Court rejected the Unions' contention on the ground that plaintiffs' complaint satisfied the objection requirement. We agree.

No Supreme Court case explicitly establishes a contemporaneous-objection requirement. While *International Association of Machinists v. Street*, 367 U.S. 740, 6 L. Ed. 2d 1141, 81 S. Ct. 1784 (1961), held that each non-member must individually object to disputed fair-share fees, that requirement merely places the burden on dissenting employees affirmatively to opt out of fees to which they object, rather than allowing them to opt into fees with which they agree. *See id.* at 771 (holding that because the individual *Street* plaintiffs "have in the course of [this action] made known to their respective unions their objection to the use of their money for the support of political causes[,] . . . the respective unions were without power to use payments thereafter tendered by them for such political causes"). Since *Street*, the Court has reiterated that non-members may raise their initial objection in a complaint. *Abood*, 431 U.S. at 239 ("The requirement in Street that dissent be affirmatively indicated was satisfied by the allegations in the complaint that was filed.") (citation omitted); *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Exps. & Station Employees v. Allen*, 373 U.S. 113, 119 n.6, 10 L. Ed. 2d 235, 83 S. Ct. 1158 (1963) (citing *Street*, 367 U.S. at 771) (employees in Railway Labor Act case "first made known their objection to the [unions']

political expenditures in their complaint filed in this action; however, this was early enough").

Yet the Unions argue that *Hudson* imposed a more onerous notice standard and that "post-*Hudson* cases have implicitly rejected the notion of objection-by-lawsuit." Even assuming *arguendo* that the Unions are correct, the contemporaneous-objection principle they espouse would nonetheless be inapplicable in this case because, as we explain more fully *infra* in Section III.B, "the notice procedures and the fee information given under the plan were inadequate." *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 430 (6th Cir. 1990). Thus the plaintiffs lacked sufficient information to formulate a contemporaneous objection.

B. Independent Auditor Verification

In *Hudson*, the Supreme Court held that a local union representing 27,500 employees and collecting over $ 4 million in annual dues must provide non-members with "sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306. The Court went on to explain that "the Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, *as well as verification by an independent auditor*." *Id.* at 307 n.18 (emphasis added). We applied *Hudson*'s independent auditor requirement in *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992), and held that the First Amendment required a state-level exclusive bargaining representative for approximately 54,000 employees to obtain independent auditor verification. *Id.* at 415-16. We noted that "the purpose of requiring the verification in the [*Hudson*] notice is to give the nonmembers some prior assurance that the [fair-share] fee was properly calculated," and "when nonmembers do not receive that assurance, their constitutional rights are violated under *Hudson*." *Id.* at 415.

Today we decide whether *Hudson*'s independent auditor requirement applies to SAEA, a much smaller union than the unions involved in *Hudson* and *Hohe*. Plaintiffs argue that it does. The Unions contend that *Hudson*'s independent auditor requirement was merely *dictum* or applies only to large unions, like those in *Hudson* and *Hohe*, that can afford an independent auditor. They point out that SAEA would spend more on an audit than it collects through fair-share fees. Moreover, the Unions claim that SAEA's finances are so simplistic that non-members can obtain "sufficient information," *Hudson*, 475 U.S. at 306, by examining its documents themselves.

The Ninth Circuit has addressed this issue. In *Prescott v. County of El Dorado*, 177 F.3d 1102 (9th Cir. 1999), *vacated on other grounds*, 528 U.S. 1111 (2000), *reinstated in relevant part*, 204 F.3d 984 (2000), the Court held that, regardless of its accompanying high cost, a state union must conduct a "true audit." *Id.* at 1107-08. However, the Court left unanswered whether the independent auditor requirement applied to a small local union. *Id.* at 1108. ("We do not decide that each little unit in the [state union] firmament must necessarily be subjected to a separate verified audit of its expenditures . . . ."). In a subsequent case very recently decided, *Harik v. California Teachers Assoc.*, 326 F.3d 1042, 2003 U.S. App. LEXIS 7079, Nos. 01-15590, 01-15688, 01-15705, 2003 WL 1873736 (9th Cir. April 15, 2003),[5] the Court provided an answer: an independent auditor verification is not necessary. The *Harik* Court interpreted

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[5] The Ninth Circuit initially decided *Harik* on August 1, 2002, but withdrew its opinion and substituted a revised opinion on April 15, 2003. The earlier opinion held that a small local union must obtain "independent verification" of its expenses, but need not obtain a "formal audit." *Harik v. Cal. Teachers Ass'n*, 298 F.3d 863, 866 (9th Cir. 2002). The Court did not discuss precisely what "independent verification" entails and how it differs from the "true audit" Prescott required of larger unions.

Hudson to require, in the context of a local union with under $50,000 in estimated annual revenues, "*either* [disclosure of] the full financial material necessary to verify [a union's expenditures], *or* an independently sanctioned verification of [] the local union's chargeable and non-chargeable expenditures." *Id.* at *4 (emphasis added). Thus, a small local union need only provide sufficient information so that a "nonmember can independently verify that the union spent its money where it claimed that it did." *Id.* In so doing, the Ninth Circuit shifted the burden of expense verification from the union to the nonmember. It reasoned that "[f]or the smallest affiliates, providing financial reports along with full and fair access to bills, check stubs, canceled checks, account balances, and related materials may be more cost-efficient than an external review." *Id.*[6]

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[6] Additionally, a state case from Massachusetts, *Wareham Education Association v. Labor Relations Commission*, 430 Mass. 81, 713 N.E.2d 363 (Mass. 1999), squarely addressed the question before us and held that "there is no exception to *Hudson*'s audit requirement for small local union affiliates." *Id.* at 368. Another state-court case, *Whitley County Teachers Association v. Bauer*, 718 N.E.2d 1181 (Ind. Ct. App. 1999), reached the opposite result, holding that *Hudson* was not violated when a local union did not obtain an independent audit of its financial records. *Id.* at 1191-92. In *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), the Sixth Circuit wrote that *Hudson* required "an audited, detailed accounting of local union payments to affiliated state and national labor organizations." *Id.* at 1503. However, the Court did not make this statement in the context of a claim that *Hudson*'s requirements should apply differently to a small local union, as is the case here.

In *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir. 1987), the Second Circuit also addressed the small union verification issue, but decided the case without resolving it. It determined that "the procedures mandated by *Hudson* are to be accorded all nonmembers of agency shops regardless of whether the union believes them to be excessively costly." *Id.* at 339. However, the Court limited this broad statement in a footnote, in which it pointed out that it was not addressing whether or how *Hudson* applies to small local unions because the local union there was one of "three interlocking organizations"—the local

Harik acknowledges that "union costs [for verification] do not trump non-members' First Amendment rights," *id.*, and thus presumably there is no bye from *Hudson*'s requirement of independent auditor verification. But for "smaller unions" (we assume the Court means those with estimated annual revenues between $50,000 and $100,000), it is "confident that [they] can devise flexible and creative 'auditor-verifiable methodologies', appropriately tailored to provide their nonmembers with a reasonable opportunity for meaningful verification, without depleting the union coffers." *Id.* And "for the smallest affiliates" (we assume those unions with estimated annual revenues under $50,000), *Harik* (as already noted) allows the option of providing financial reports (unaudited and, it appears, lacking any independent auditor oversight) along with "full and fair access" to the underlying financial information. The District Court in that case thus "erred . . . in requiring more than adequate accessible information using an auditor verifiable methodology that could verify [the local union's] expenditures." *Id.* In so doing, *Harik* excises "independent auditor" from *Hudson*'s "verification by an independent auditor," 475 U.S. at 307 n.18, at least "[f]or the smallest [union] affiliates." *Harik*, 298 F.3d 863, 2003 WL 1873736, at *4. Instead, "verification" can mean producing "adequate accessible information using an auditor verifiable methodology." *Id.* We do not find this an available option unless the Supreme Court tells us otherwise.

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union, the state union, and the NEA. *Id.* at 340 n.2 ("[The district court's] opinion implies that *Hudson* might not require an independent auditor if the union involved were small enough. We need not decide the issue here.") (internal citation omitted). While *Andrews* did not provide any basis for us to determine whether the local unions at issue were larger than SAEA, we note that SAEA too is part of "three interlocking organizations"—SAEA, PSEA, and NEA.

Were we writing on a clean slate, we might well require something less rigorous for small local unions than independent auditor verification. But the slate is not clean. We are bound by the Supreme Court's decision in *Hudson*, and its directive of "verification by an independent auditor" means just that. *Hudson* implied no intent to make the audit requirement depend on the size of the reporting union.[7] Absent a counter direetive by the Supreme Court, we likewise make no exception. *See Agostini v. Felton*, 521 U.S. 203, 237, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997) (stating that "if a precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions") (quoting *Rodriguez de Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477, 484, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989)) (alteration in original).

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[7] The Unions note that, in the NLRB context, some courts have approved what is known as the "local presumption"—an assumption that the percentage of chargeable to nonchargeable expenses will be the same for the local union as for the parent union. *See, e.g., Finerty v. NLRB*, 324 U.S. App. D.C. 346, 113 F.3d 1288, 1292-93 (D.C. Cir. 1997); *see also Thomas v. NLRB*, 341 U.S. App. D.C. 294, 213 F.3d 651, 659-60 (D.C. Cir. 2000); *Price v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 927 F.2d 88, 93-94 (2d Cir. 1991) (approving use of local presumption). Courts presented with First Amendment questions in the public employer context have not approved of the local presumption, however. *See, e.g., Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 431 (6th Cir. 1990); *Prescott*, 177 F.3d at 1108. Whatever the validity of the local presumption, it is irrelevant to the question presented in this case. The local presumption is merely a method for estimating a local union's ratio of chargeable to nonchargeable expenses. At issue here is whether an auditor must verify the total expenses to which that ratio may be applied. *See Hohe*, 956 F.2d at 410 (in a case in which a union attempted to apply the local presumption, holding disclosure to non-members inadequate because "the notice . . . to nonmembers did not disclose the affiliated locals' 'major categories of expenses' nor was there any assertion that the locals' categories of expenses mirrored those of [the state union].").

But what level of independent auditor verification does Hudson require? Broadly speaking, auditors can provide three different types of accounting services: compilations, reviews, and audits. A compilation is the "lowest level of assurance" regarding an entity's financial statements. Christian Tregillis, *Overview of Services Provided by CPAs, in Basics of Accounting & Finance: What Every Practicing Lawyer Needs to Know* 88 (PLI Corp. Law & Practice Course, Handbook Series No. B-1064, 1998). It expresses "neither an opinion nor any level of assurance." *Id.* When performing a compilation, an accountant need not "verify or corroborate the financial statement information provided by the client." Jane Dillard-Eggers, *Understanding Compilations, Reviews, and Audits, at* http://www.tscpa.com/public/smallbusinessarticles/understanding_compilations.htm.

A review involves an intermediate level of scrutiny in which the auditor provides "limited assurance" on the entity's financial statements. *See id.* In so doing, the auditor indicates that he "is not aware of any material modifications needed to be in conformity with [generally accepted accounting principles, also known as GAAP.]" *Tregillis*, supra, at 88. In order to provide this "limited assurance," the auditor must make some, but not comprehensive, inquiry into client management, accounting practices, internal control structure, and analytical procedures used by the organization. *See* Dillard-Eggers, supra. The scope of the "inquiry and analytical procedures are the major difference between a review and a compilation." Larry P. Bailey, *GAAS Guide: A Comprehensive Restatement of Generally Accepted Auditing Standards* 16.31 (1994).

In an audit, which provides "the highest level of assurance on financial statements," the accountant "provides *verification* of the financial statements' claims and assertions" and expresses an opinion on the entity's financials. *Tregillis*, supra, at 85 (emphasis added). Among other procedures, the

accountant "considers and evaluates . . . the internal control system of the [client] . . . [and] tests . . . the underlying documentation to support account balances." Dillard-Eggers, *supra*; *Bailey, supra*, at 16.51. Annual audits are required for all publicly traded companies. *Tregillis*, supra, at 85.

As between a review and an audit, "[a] review may bring to the accountant's attention significant matters affecting the financial statements, but it does not provide assurance that the accountant will become aware of all significant matters that would be disclosed in an audit." 1 John R. Clay *et al., Guide to Compilation and Review Engagements* § 101.5 (24th ed. 2002). This is because "a review does not contemplate obtaining an understanding of the internal control structure or assessing control risk; tests of accounting records and of responses to inquiries by obtaining corroborating evidential matter through inspection, observation or confirmation; and certain other procedures ordinarily performed during an audit." *Id.*

We hold that local unions, regardless of their size, are required to obtain audits of their financial statements. Compilations and reviews do not provide an adequate basis for a non-member to decide whether to object to a fair-share fee. *See Prescott*, 177 F.3d at 1107 ("An audit, as opposed to a review, offers at least some verification of the amounts disclosed in the financial statement. . . . We do not see how a mere review of the union's records can offer the 'verification' that the Supreme Court and we have spoken of."). Indeed, "verification"—the word used by the Supreme Court in *Hudson*, 475 U.S. at 307 n.18, and by at least one accounting authority in describing an audit, *see* Tregillis, *supra*, at 85—means authenticating or confirming the truth or accuracy of a statement. *Webster's Third New Int'l Dictionary of the English Language Unabridged* 2543 (1971). Put another way, an audit "make[s] assurance double sure." William Shak-

speare, *Macbeth* act 4, sc. 1, line 96 (W.J. Craig, ed., Oxford 1914). A review does not.[8]

We take no position on the precise procedures an accountant must follow when auditing a local union.[9] Like the Second Circuit in *Andrews v. Educ. Assoc. of Cheshire*, 829 F.2d 335(2d Cir. 1987), and the Sixth Circuit in *Gwirtz v. Ohio Education Association*, 887 F.2d 678, 680 (6th Cir. 1989), we decline to hold either that an accountant's audit procedures must constitute the "least restrictive process imaginable," *Andrews*, 829 F.2d at 340, or that local unions must obtain the "'highest' possible level of audit service," *Gwirtz*, 887 F.2d at 680. *See generally Prescott*, 177 F.3d at 1107 (noting that audits "may vary in procedures and sampling rates"). We do note, however, that *Hudson* does not require absolute precision within the audit context. *See Hudson*, 475 U.S. at 307 n.18 ("We continue to recognize that there are practical reasons why 'absolute precision' in the

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[8] We recognize that accountants review rather than audit public corporations' interim financial statements, D. Edward Martin, *Attorney's Handbook of Accounting, Auditing and Financial Reporting* § 13.03[1] (4th ed. 2002), and that investors rely on these unaudited interim financial statements when making investment decisions. Despite this industry practice, we believe that, until the Supreme Court tells otherwise, *Hudson* forecloses the argument that a review is acceptable in this context.

[9] However, we read literally *Hudson*'s requirement of auditor independence and therefore require that the accountant performing the audit be truly independent of the local union, *i.e.*, not an accountant employed in-house by the union. *See Ferriso v. NLRB*, 326 U.S. App. D.C. 338, 125 F.3d 865, 871-73 (D.C. Cir. 1997) (holding that *Hudson* requires an auditor to have "independence and qualifications [that] conform to prevailing norms for audits of comparable entities."). *But see Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1017 (7th Cir. 1998) (Posner, J.) (explicitly declining to follow *Ferriso* because "'independence' is a slippery term" and cases requiring absolute independence failed to "consider alternatives" and are "in tension with cases . . . that hold that dissenters are not entitled to the highest level of audit services that the market offers").

calculation of the charge to nonmembers cannot be 'expected or required.'") (quoting *Allen*, 373 U.S. at 122) (alteration in original).[10]

We recognize that our decision might place high costs on some local unions. But this is how we read *Hudson*'s requirement of "verification by an independent auditor." *Id.* Further, local unions are not without options. For example, unions without the financial wherewithal to afford the Hudson-required audit might choose to enter into combinations with other small unions to achieve necessary economies of scale. In the alternative, state or national unions might choose to subsidize the cost of local unions' audits.

C. Litigation Expenditures

Plaintiffs' fair-share fees include charges for collective-bargaining-related litigation conducted by PSEA or its affiliates but unrelated specifically to the SAEA unit. Such expenses are known as extra-unit litigation expenses. Plaintiffs contend that the extra-unit litigation expenses at issue are nonchargeable. *See Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exps., & Station Employees*, 466 U.S. 435, 453, 80 L. Ed. 2d 428, 104 S. Ct. 1883 (1984) (holding certain litigation expenses not incurred on behalf of non-members' bargaining unit unchargeable to those non-

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[10] In this vein, we follow other circuits that have held that the independent audit requirement does not require the auditor to verify the local union's classification of expenses as chargeable or nonchargeable. *See, e.g., Dashiell v. Montgomery County, Md.*, 925 F.2d 750, 755-56 (4th Cir. 1991); *Gwirtz*, 887 F.2d at 682 n.3; *Ping v. Nat'l Educ. Ass'n*, 870 F.2d 1369, 1374 (7th Cir. 1989); *Andrews*, 829 F.2d at 340. We agree with these circuits that chargeability is a legal question. *Dashiell*, 925 F.2d at 755-56; *Gwirtz*, 887 F.2d at 682 n.3; *Ping*, 870 F.2d at 1374; *Andrews*, 829 F.2d at 340. To require an accountant to verify that a union has correctly classified expenditures is "tantamount to requiring the auditor to give a second legal opinion," *Dashiell*, 925 F.2d at 756, which is clearly beyond the scope of an auditor's duties.

members). The Unions argue that, because the litigation expenses at issue are "pooled" across PSEA affiliates, these expenses are chargeable to non-union members. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524, 114 L. Ed. 2d 572, 111 S. Ct. 1950 (1991) (holding that a union may charge non-members for their *pro rata* share of certain expenses incurred pursuant to a cost-sharing agreement with affiliate unions). This case requires us to address an expense-chargeability issue that lies in the intersection of the *Ellis* and *Lehnert* holdings: whether a union may charge non-members for their *pro rata* share of expenses that relate to litigation *and* that were incurred on behalf of an affiliate union pursuant to a cost-sharing agreement.

As noted, Ellis holds that a union may not charge non-union members for certain extra-unit litigation expenses.[11] *Ellis*, 466 U.S. at 453 (while expenses of collective-bargaining-related litigation arising from the non-members' bargaining unit are "clearly chargeable" to that employee, "the expenses of litigation not having such a connection with the [non-members'] bargaining unit are not to be charged to objecting employees").[12] But *Ellis* did not involve expenses

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[11] Examples of the disputed litigation expenses in *Ellis* included "the union's challenge to the legality of the airline industry's Mutual Aid Pact, under which a struck carrier receives substantial financial assistance from non-struck carriers; the protection of employees' rights during bankruptcy proceedings involving an employer; the doctrine of fair representation; and the defense of suits alleging violation of the non-discrimination requirements of Title VII." *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exps., & Station Employees*, 685 F.2d 1065, 1073 (9th Cir. 1982), *aff'd in part and rev'd in part*, 466 U.S. 435, 80 L. Ed. 2d 428, 104 S. Ct. 1883 (1984).

[12] While *Ellis* interpreted the Railway Labor Act ("RLA") rather than the First Amendment, subsequent cases have suggested that RLA cases such as *Ellis* "necessarily provide some guidance regarding what the First Amendment will countenance in the realm of union support of political activities through mandatory assessments." *Lehnert*, 500 U.S. at 516; *see also Romero v. Colegio De Abogados De P.R.*, 204 F.3d 291, 298 (1st Cir.

incurred by an affiliate bargaining unit pursuant to an expense-pooling arrangement with that affiliate. Here, PSEA and its affiliates have agreed to pool their litigation expenses for the unions' mutual benefit. This presents a significantly different question than *Ellis*. Even if a local union party to such an arrangement does not litigate in any given year, it still derives a tangible benefit from participating in an expense-pooling agreement: the availability of on-call resources greater than those it could muster individually. *Cf. Finerty v. NLRB*, 324 U.S. App. D.C. 346, 113 F.3d 1288, 1292 (D.C. Cir. 1997) ("It is indisputable that, by pooling its resources on a union-wide basis, a union, which is the bargaining representative of *all* its members, provides some benefit to members of the various local unions.") (emphasis in original). Moreover, it is unclear whether the *Ellis* Court would have reached the same result if the extra-unit litigation at issue were more related to the collective bargaining activities of the *Ellis* plaintiffs' bargaining unit. In other words, it is unclear whether the Court intended to state a *per se* rule against the chargeability of extra-unit litigation expenses.

In *Lehnert*, the Supreme Court held that a union may charge non-union members for their *pro rata* share of expenses incurred on behalf of affiliate bargaining units when there is "some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Lehnert*, 500 U.S. at 524.[13] A majority of the

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2000) ("Although the decision [in *Ellis*] turned on a statutory interpretation of the Railway Labor Act, the Court was clear that its interpretation was required to avoid constitutional difficulty. Later cases have interpreted *Ellis* as setting forth constitutional rules . . . .") (internal citations omitted).

[13] The dissent also endorsed this result, even though it would have reached that conclusion through a different analytical path. *See Lehnert*, 500 U.S. at 561-62 (Scalia, J., concurring in the judgment in part and dissenting in part).

Court in *Lehnert* reached this conclusion by applying a three-part test to assess whether a particular union affiliate's expense is chargeable to non-members of the union. "Chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519.[14] However, when the *Lehnert* Court attempted to apply this test to a question similar to the one before us—whether expenses for reporting on extra-unit litigation, where litigation expenses are incurred pursuant to a cost-pooling agreement with an affiliate union, are chargeable to non-members of the local bargaining unit—no five justices agreed.

Justice Blackmun, joined by Chief Justice Rehnquist and Justices White and Stevens, noted that dissenting employees may not be charged for the costs of union literature reporting on extra-unit litigation because they cannot be charged for such litigation itself under *Ellis*. *Id.* at 528. He acknowledged that litigation conducted by one bargaining unit could establish precedents useful to another bargaining unit. But he concluded that this potential benefit was too attenuated and that "extraunit litigation [is] more akin to lobbying [which is not chargeable] in both kind and effect." *Id.*[15] Were Jus-

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[14] While this test was in a plurality opinion of Chief Justice Rehnquist and Justices Blackmun, White and Stevens, *see Lehnert*, 500 U.S. at 519, a fifth justice, Justice Marshall, joined the portion of the plurality opinion containing the test, *see id.* at 534 (Marshall, J., concurring in part and dissenting in part).

[15] Justice Marshall, who otherwise concurred in Justice Blackmun's opinion, emphasized that *Lehnert* concerned the chargeability of a union's *reporting* on extra-unit litigation. Chargeability of reporting is different from chargeability of the litigation itself. This disagreement about the scope of the issues before the Court led Justice Marshall to dissent on this issue. He would have held reporting on extraunit litigation expenses chargeable, "particularly since the publication costs at issue are *de*

tice Blackmun able to garner five justices' votes for the proposition that extra-unit litigation is not chargeable to non-union members, *Lehnert* would control here. However, as we discuss, he wrote only for a plurality of four.

Justice Scalia, joined by Justices O'Connor and Souter, "agreed with the Court's disposition of many of the challenged expenditures," but disagreed with the majority's three-part test for evaluating the chargeability of expenditures. *Lehnert*, 500 U.S. at 550 (Scalia, J., concurring in the judgment in part and dissenting in part). Rather, Justice Scalia would permit expenses to be charged to non-members when those expenses are incurred as part of "the union's statutory duties as exclusive bargaining agent." *Id.* However, he did not apply his preferred test to the question whether dissenting employees could be charged for the expenses of union reporting on extra-unit litigation (or for the expenses of extra-unit litigation itself).

Justice Kennedy, who endorsed Justice Scalia's rather than Justice Blackmun's chargeability test, wrote separately to argue that extra-unit litigation expenditures should be allowed if "undertaken in the course of the union's duties as exclusive bargaining representative." Lehnert, 500 U.S. at 563 (Kennedy, J., concurring in the judgment in part and dissenting in part). He criticized Justice Blackmun's reliance on Ellis to resolve the question whether costs of reporting on extra-unit litigation are chargeable, pointing out that Ellis did not address a litigation-cost-sharing arrangement. Id. at 564.

Despite the fact that no five justices explicitly agreed on the chargeability of expenses arising from extra-unit litigation, plaintiffs insist that *Lehnert* controls our disposition of the litigation-expenditures issue. They contend that because Justice Scalia was clear when he disagreed with the Court's

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minimis" and involved only "a few pennies." *Lehnert*, 500 U.S. at 534, 546. (Marshall, J., concurring in part and dissenting in part).

rulings on other expenditures, he must have agreed with Justice Blackmun's position that extra-unit litigation expenditures are not chargeable. We disagree with the plaintiffs' interpretation of Justice Scalia's opinion, for his silence is inconclusive.[16] We are therefore left without definitive Supreme Court guidance. *See Planned Parenthood of S.E. Pa. v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991), *aff'd in part and rev'd in part*, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) (stating that a putative majority standard must "necessarily produce results with which a majority of the Court from that case would agree").

The Sixth Circuit, the Court of Appeals from which *Lehnert* was appealed to the Supreme Court, addressed the issue before us in *Reese v. City of Columbus*, 71 F.3d 619 (6th Cir. 1995). The Court agreed with Justice Marshall that the *Lehnert* plurality's statement on extra-unit litigation expenses was "no more than *dicta*" because at issue was the cost of reporting on extra-unit litigation. *Id.* at 623-24. It then proceeded to find that *Lehnert* not only allowed, but required,

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[16] We note that application of Justice Scalia's chargeability standard does not necessarily result in the prohibition against pooled extra-unit litigation expenses that Justice Blackmun espoused. A union's incurring extra-unit litigation expenses might, under some circumstances, be "essential to [the union's] discharge of its duties as bargaining agent." *Lehnert*, 500 U.S. at 560 (quoting *Ellis*, 466 U.S. at 448-49) (Scalia, J., concurring in the judgment in part and dissenting in part). Moreover, Justice Scalia's willingness to consider as a chargeable expense an annual fee assessed by a national union to a local bargaining unit to ensure the availability of on-demand services, *id.* at 561-62, suggests that he might also be willing to consider as chargeable a local bargaining unit's *pro rata* share of pooled litigation expenses. That *pro rata* assessment is essentially an annual fee to ensure the availability of litigation resources to the local unit—a form of insurance. We therefore disagree with the Tenth Circuit's conclusion in *Pilots Against Illegal Dues v. Air Line Pilots Association*, 938 F.2d 1123, 1130 n.4 (10th Cir. 1991), that a majority of the *Lehnert* Court would not allow extra-unit litigation expenses incurred pursuant to a pooling agreement to be charged to non-union members.

it to approve the charges "because a majority [in *Lehnert*] approved of charges for pooled expenses like those in this case." *Id.* at 624. While *Reese* overstates *Lehnert*'s holding, as the *Lehnert* majority never held extra-unit litigation expenses incurred pursuant to a pooling agreement to be chargeable, we nonetheless agree with the Sixth Circuit's conclusion.

Moreover, in *International Association of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), the Seventh Circuit enforced an NLRB decision in which the NLRB rejected as a matter of law the proposition that extra-unit litigation expenses should be treated differently from other extra-unit expenses and instead "applied the same standard for determining the chargeability of litigation expenses as we are required . . . to apply to all other expenses." *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 239 (1995). The Seventh Circuit agreed that litigation expenditures are "analytically identical" to other expenditures related to collective bargaining. *International Ass'n of Machinists & Aerospace Workers*, 133 F.3d at 1016.

We too uphold the chargeability of the extra-unit litigation expenses at issue by applying the *Lehnert* majority's three-part chargeability test: "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519. First, that the litigation expenses at issue were incurred pursuant to an expense-pooling arrangement makes the *pro rata* share of those expenses charged to SAEA members and non-members akin to insurance. *See id.* at 523 (noting that because "the essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in

need of them," the portion of a local's fair-share fee that "contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year"). The "premium" that SAEA members and non-members pay, in the form of a *pro rata* share of litigation expenses, ensures that the local bargaining unit will have sufficient resources at its disposal should it need, in the future, to engage in collective-bargaining-related litigation (which would be chargeable to non-union members). Because the extra-unit litigation expenditures at issue ensure the availability of resources for collective-bargaining-related litigation, those expenditures are germane to collective-bargaining activity.

Applying the second prong of the *Lehnert* test, we note that the free-rider concerns applicable to other pooled-expense arrangements apply with equal force to extra-unit litigation expenditures.

Third, extra-unit litigation expenses present "little additional infringement of First Amendment rights beyond that already accepted," *Ellis*, 466 U.S. at 456, where, as here, the pooled litigation resources are expended on collective-bargaining-related activities and "may ultimately inure to the benefit of the members of the local union," *Lehnert*, 500 U.S. at 524. That non-litigation, collective-bargaining-related expenses for, *inter alia*, pooled negotiating advice and informational assistance in *Lehnert* are chargeable to objecting employees informs our conclusion.

Unlike the Justice Blackmun camp in *Lehnert*, we discern no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses. Thus we conclude that they are chargeable to SAEA's non-members.

D. Multi-occupational representation

In addition to providing services to education professionals, PSEA's affiliated local associations also provide collective-bargaining-related services to healthcare professionals. When PSEA calculates the expenses chargeable to fair-share payers, it does not allocate chargeable costs by profession. Rather, it includes as part of fair-share fees the expenses incurred on behalf of all represented employees, *i.e.*, educators and healthcare professionals. Plaintiffs argue that the First Amendment bars PSEA from passing onto them costs incurred on behalf of healthcare professionals because PSEA has not shown that those costs "may ultimately inure to [their education unit's] benefit . . . by virtue of [its] membership in [PSEA]." *Lehnert*, 500 U.S. at 524.

The District Court granted summary judgment in favor of the Unions, holding that the plaintiffs failed to allege facts suggesting that any of the three *Lehnert* requirements were not satisfied (to repeat, that the expenditures are not "'germane' to collective-bargaining activity," not "justified by the government's vital policy interest in labor peace and avoiding 'free riders,'" or that they "significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop"). *Id.* at 519. In so doing, the District Court improperly placed the burden of proof on the plaintiffs when it belonged on the Unions. As *Lehnert* points out, "the union [bore] the burden of proving the proportion of chargeable expenses to total expenses." *Id.*

Because plaintiffs do not challenge any particular expenditures, we evaluate, as a matter of law, whether PSEA may pool costs across occupational groups. We answer this question affirmatively. As discussed above, *Lehnert* held that "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the

direct benefit of the objecting employees' bargaining unit," so long as there is "some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Id.*

In our case, the pooling arrangement confers potential benefits on the plaintiffs. First, the arrangement generates economies of scale that redound to their benefit. Second, by spreading the costs of otherwise-chargeable expenses over a pool of employees whose chargeable-expense levels are not perfectly correlated with their own (*i.e.*, healthcare professionals as well as education professionals), education professionals reduce their risk of being assessed unusually high chargeable expenses in any given year. Moreover, this pooling arrangement does not necessarily increase the dollar amount of chargeable expenses assessed to plaintiffs for any particular year. Just as education professionals are assessed for healthcare professionals' chargeable expenses, so too healthcare professionals are assessed for education professionals' chargeable expenses. As PSEA correctly points out, this arrangement may result in lower fair-share fees than those assessed in the absence of such an arrangement.

We also note that the *Lehnert* Court did not limit its holding only to bargaining units within the same industry, or within related industries. Instead, it stated a broad principle: "that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." *Id.* at 523. Though this reasoning was not that employed by the

District Court, it nonetheless supports its ultimate grant of summary judgment to the Unions.[17]

* * * * *

We reverse the District Court's grant of summary judgment in favor of the plaintiffs on the issue of charging them fair-share fees for extra-unit litigation expenses. In all other respects, we affirm.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

[17] We may affirm for any reason supported by the record, even if not relied on by the District Court. *Nicini v. Morra*, 212 F.3d 798, 805 (3d Cir. 2000).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed May 8, 2003]

No. 01-3858

MARSHA OTTO; F. NAYLOR EMORY; DENNIS A. ERB; ROBERT K. GILBERT; JAMES W. LOSSELL; BARBARA J. MCALLEY; WESLEY S. SEMPLE, On behalf of themselves and all other non-members similarly situated,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION-NEA; NATIONAL EDUCATION ASSOCIATION; SHALER AREA EDUCATION ASSOCIATION, On behalf of themselves and all other local associations similarly situated,

Appellants,

No. 01-4110

MARSHA OTTO; F. NAYLOR EMORY; DENNIS A. ERB; ROBERT K. GILBERT; JAMES W. LOSSELL; BARBARA J. MCALLEY; WESLEY S. SEMPLE, On behalf of themselves and all other non-members similarly situated,

Appellants,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION-NEA; SHALER AREA EDUCATION ASSOCIATION, On behalf of themselves and all other local associations similarly situated; NATIONAL EDUCATION ASSOCIATION; GROVE CITY AREA EDUCATION ASSOCIATION; JANE CAMPBELL; BARBARA LEIBY

(D.C. Civil Action No. 96-cv-01233)

Present: BECKER, Chief Judge*, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, SMITH and STAPLETON **, *Circuit Judges* and O'NEILL***, *District Judge.*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges of the Circuit in regular active service, and a majority of the circuit judges of the Circuit in regular active service not having voted for rehearing by the Court *en banc*, the petition for rehearing is DENIED. Chief Judge Becker* and Judge Nygaard would have granted rehearing *en banc*.

The judges who participated in the decision of the Court having voted for rehearing, the petition for panel rehearing is granted and the opinion and judgment entered April 3, 2003 are vacated. An amended opinion is issued as of this date.

* Judge Becker was Chief Judge at the time for voting on the petition for rehearing.

** Senior Judge Walter K. Stapleton, who sat on the original panel, is limited to panel rehearing only.

*** Judge Thomas O'Neill, Jr., United States District Judge for the Eastern District of Pennsylvania, sitting by designation, is limited to panel rehearing only.

By the Court,

/s/ Thomas L. Ambro
THOMAS L. AMBRO
Circuit Judge

Dated: May 8, 2003

A True Copy:
Teste:

Clerk of the United States Court of Appeals
For the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed April 3, 2003]

No. 01-3858

MARSHA OTTO; F. NAYLOR EMORY; DENNIS A. ERB; ROBERT K. GILBERT; JAMES W. LOSSELL; BARBARA J. MCALLEY; WESLEY S. SEMPLE, On behalf of themselves and all other non-members similarly situated,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION; NATIONAL EDUCATION ASSOCIATION; SHALER AREA EDUCATION ASSOCIATION, On behalf of themselves and all other local associations similarly situated,

Appellants,

No. 01-4110

MARSHA OTTO; F. NAYLOR EMORY; DENNIS A. ERB; ROBERT K. GILBERT; JAMES W. LOSSELL; BARBARA J. MCALLEY; WESLEY S. SEMPLE, On behalf of themselves and all other non-members similarly situated,

Appellants,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION; NATIONAL EDUCATION ASSOCIATION; SHALER AREA EDUCATION ASSOCIATION, On behalf of themselves and all other local associations similarly situated,

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 96-cv-01233)
District Judge: Honorable Yvette Kane

Argued June 27, 2002
Before: AMBRO and STAPLETON, *Circuit Judges*, and
O'NEILL,* *District Judge*.

OPINION OF THE COURT

AMBRO, *Circuit Judge*:

We consider whether, under the First Amendment, certain expenses incurred by unions may be charged to non-members and whether a local union must obtain independent auditor verification of its charges (and, if so, what kind of verification we require).

The First Amendment affords public-sector employees the freedom not to associate with a labor organization. *See Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 301, 89 L. Ed. 2d 232, 106 S. Ct. 1066 (1986) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977)). There are limits to this constitutional freedom, however, in light of organized labor's important role in advancing employment conditions. *Abood*, 431 U.S. at 225-26. Thus, as a means of curing the so-called "free-rider" problem posed by its representation of non-members, a union may charge each non-member employee a fair-share, or agency, fee equal to his or her *per capita* share of the union's expenses arising from its duties as a collective-

* Honorable Thomas N. O'Neill, Jr., United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

bargaining representative. *See id.* at 235-36. But a union may not, consistent with the First Amendment, collect fair-share dues to support ideological causes or other expenses insufficiently related to collective bargaining. *Id.*

To ensure that non-members are assessed only for fair-share fees properly chargeable to them, the Supreme Court has ruled that unions must adopt procedural safeguards "carefully tailored to minimize the [First Amendment] infringement." *Hudson*, 475 U.S. at 303. First, the union must provide a non-member with "sufficient information to gauge the propriety of the union's fee." *Id.* at 306. This explanation of the basis for the fee is often referred to as a "*Hudson* notice." Second, a non-member must have an adequate opportunity to object to the fair-share fee allocation. *See id.* at 307. The two safeguards are linked; without the *Hudson* notice, a non-member would lack a basis for deciding whether to object to a fair-share fee calculation. *Penrod v. NLRB*, 340 U.S. App. D.C. 171, 203 F.3d 41, 46 (D.C. Cir. 2000).

When theory meets practice, questions abound. Do the financial information requirements apply to small local unions? How much verification of that information must there be? When a union represents more than one bargaining unit, can that union include, in the fair-share fee assessed to non-members of one bargaining unit, costs associated with another bargaining unit's litigation? What if those bargaining units are in different industries?

I. BACKGROUND AND PROCEDURAL HISTORY

Shaler Area Education Association ("SAEA") is the exclusive bargaining representative for education professionals employed by the Shaler Area School District. SAEA is the local affiliate of the Pennsylvania State Education Association ("PSEA")—which represents, *inter alia*, both education and healthcare professionals in the Common-

wealth—and the National Education Association ("NEA," and collectively with SAEA and PSEA, the "Unions"). During the 1994-1995 school year, the Shaler Area School District employed 355 education professionals, 344 of whom were members of the SAEA (and, thereby, the PSEA and NEA). Because all three Unions provide collective-bargaining services to the plaintiffs' bargaining unit, the eleven non-members paid fair-share fees to the SAEA, PSEA, and NEA pursuant to 71 Pa. Cons. Stat. Ann. § 575 (West 2003).

Seven non-union education professionals brought this 42 U.S.C. § 1983 [1] action to challenge the Unions' fair-share fee procedure and assessments.[2] After the District Court confirmed that the plaintiffs had standing to object to the fair-share fees and the sufficiency of the Unions' *Hudson* notice,[3] the parties filed a joint stipulation of facts followed by cross-motions for summary judgment. The District Court granted partial summary judgment in favor of the plaintiffs, declaring that the SAEA must verify its expenditures through an

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[1] 42 U.S.C. § 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

[2] Six of the named plaintiffs are members of the SAEA-represented bargaining unit. The seventh, Marsha Otto, is a member of the bargaining unit represented by the Grove City Area Education Association ("GCAEA"). While GCAEA was a defendant in the original complaint, it was dismissed from the action in plaintiffs' amended complaint.

[3] However, the District Court held that, because the plaintiffs did not use the Unions' arbitration process, they lacked standing to challenge the timeliness of that process. *Otto v. Pa. State Educ. Ass'n-NEA*, 950 F. Supp. 649, 651-52 (M.D. Pa. 1997).

independent audit and that PSEA[4] could not charge the plaintiffs for expenses incurred in litigation not relating specifically to the plaintiffs' own collective-bargaining unit. However, it also held that the Unions could assess education-professional plaintiffs for non-litigation expenditures related to the Unions' representation of healthcare professionals.

Both parties appealed, and together they present four issues for our review: (1) whether, by filing their complaint, plaintiffs objected properly to the Unions' fees and procedures; (2) whether a local union, regardless of size, must obtain an independent auditor verification of the expenditures listed in its fair-share calculation notice (and, if so, we need to decide at what level of auditor inquiry); (3) whether a union may charge non-members for collective-bargaining-related litigation costs incurred on behalf of another bargaining unit pursuant to an expense-pooling arrangement with that other bargaining unit; and (4) whether a union may charge non-members for pooled resources available to all local affiliates even though some of the affiliates represent employees in different professions. We rule in favor of plaintiffs as to issues one and two (and determine the level of verification required) and the Unions on issues three and four.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. We exercise appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Whether plaintiffs properly objected to the Unions' fair-share fee calculation is a question of standing and is subject to *de novo* review. *In re RFE Indus., Inc.*, 283 F.3d 159, 163 (3d Cir. 2002). We also review *de novo* the District Court's grant of summary judgment. *Cloverland-Green*

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[4] The District Court's order refers to PSEA and NEA, though it appears that the Unions argue in their briefing only as to PSEA.

Spring Dairies, Inc. v. Pa. Milk Mktg. Bd., 298 F.3d 201, 210 (3d Cir. 2002).

III. Discussion

A. Objection Requirement

The Unions contend that plaintiffs failed to carry their burden of objecting to the fair-share fee calculation by not raising a "contemporaneous objection," *i.e.*, by not objecting at the time of fee collection. Addressing this issue as a question of plaintiffs' standing to sue, the District Court rejected the Unions' contention on the ground that plaintiffs' complaint satisfied the objection requirement. We agree.

No Supreme Court case explicitly establishes a contemporaneous-objection requirement. While *International Association of Machinists v. Street*, 367 U.S. 740, 6 L. Ed. 2d 1141, 81 S. Ct. 1784 (1961), held that each non-member must *individually* object to disputed fair-share fees, that requirement merely places the burden on dissenting employees affirmatively to opt out of fees to which they object, rather than allowing them to opt into fees with which they agree. *See id.* at 771 (holding that because the individual *Street* plaintiffs "have in the course of [this action] made known to their respective unions their objection to the use of their money for the support of political causes[,] . . . the respective unions were without power to use payments thereafter tendered by them for such political causes"). Since *Street*, the Court has reiterated that non-members may raise their initial objection in a complaint. *Abood*, 431 U.S. at 239 ("[T]he requirement in *Street* that dissent be affirmatively indicated was satisfied by the allegations in the complaint that was filed.") (citation omitted); *Brotherhood of R. & S.S. Clerks, etc. v. Allen*, 373 U.S. 113, 119 n.6, 10 L. Ed. 2d 235, 83 S. Ct. 1158 (1963) (citing *Street*, 367 U.S. at 771) (employees in Railway Labor Act case "first made known their objection to the [unions'] political expenditures in their complaint filed in this action; however, this was early enough").

Yet the Unions argue that *Hudson* imposed a more onerous notice standard and that "post-*Hudson* cases have implicitly rejected the notion of objection-by-lawsuit." Even assuming *arguendo* that the Unions are correct, the contemporaneous-objection principle they espouse would nonetheless be inapplicable in this case because, as we explain more fully *infra* in Section III.B, "the notice procedures and the fee information given under the plan were inadequate." *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 430 (6th Cir. 1990). Thus the plaintiffs lacked sufficient information to formulate a contemporaneous objection.

B. Independent Auditor Verification

In *Hudson*, the Supreme Court held that a local union representing 27,500 employees and collecting over $ 4 million in annual dues must provide non-members with "sufficient information to gauge the propriety of the union's fee." 475 U.S. at 306. The Court went on to explain that "[t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, *as well as verification by an independent auditor*." *Id.* at 307 n.18 (emphasis added). We applied *Hudson*'s independent auditor requirement in *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992), and held that the *First Amendment* required a state-level exclusive bargaining representative for approximately 54,000 employees to obtain independent auditor verification. *Id.* at 415-16. We noted that "the purpose of requiring the verification in the [*Hudson*] notice is to give the nonmembers some prior assurance that the [fair-share] fee was properly calculated," and "[w]hen nonmembers do not receive that assurance, their constitutional rights are violated under *Hudson*." *Id.* at 415.

Today we decide whether *Hudson*'s independent auditor requirement applies to SAEA, a much smaller union than the unions involved in *Hudson* and *Hohe*. Plaintiffs argue that it

does. The Unions contend that *Hudson*'s independent auditor requirement was merely *dictum* or applies only to large unions, like those in *Hudson* and *Hohe*, that can afford an independent auditor. They point out that SAEA would spend more on an audit than it collects through fair-share fees. Moreover, the Unions claim that SAEA's finances are so simplistic that non-members can obtain "sufficient information," *Hudson*, 475 U.S. at 306, by examining its documents themselves.

No other circuit has clearly resolved this issue.[5] In *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir.

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[5] A state case from Massachusetts, *Wareham Educ. Ass'n v. Labor Rels. Comm'n*, 430 Mass. 81, 713 N.E.2d 363 (Mass. 1999), squarely addressed the question before us and held that "there is no exception to *Hudson*'s audit requirement for small local union affiliates." *Id.* at 368. Another state-court case, *Whitley County Teachers Association v. Bauer*, 718 N.E.2d 1181 (Ind. Ct. App. 1999), reached the opposite result, holding that *Hudson* was not violated when a local union did not obtain an independent audit of its financial records. *Id.* at 1191-92. In *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), the Sixth Circuit wrote that *Hudson* required "an audited, detailed accounting of local union payments to affiliated state and national labor organizations." *Id.* at 1503. However, the Court did not make this statement in the context of a claim that *Hudson*'s requirements should apply differently to a small local union, as is the case here.

The Unions note that, in the NLRB context, some courts have approved what is known as the "local presumption"—an assumption that the percentage of chargeable to nonchargeable expenses will be the same for the local union as for the parent union. *See, e.g., Finerty v. NLRB*, 324 U.S. App. D.C. 346, 113 F.3d 1288, 1292-93 (D.C. Cir. 1997); *see also Thomas v. NLRB*, 341 U.S. App. D.C. 294, 213 F.3d 651, 659-60 (D.C. Cir. 2000); *Price v. International Union, United Auto., etc.*, 927 F.2d 88, 93-94 (2d Cir. 1991) (approving use of local presumption). Courts presented with First Amendment questions in the public employer context have not approved of the local presumption, however. *See, e.g., Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 431 (6th Cir. 1990); *Prescott v. County of El Dorado*, 177 F.3d 1102, 1108 (9th Cir. 1999). Whatever the validity of the local presumption, it is irrelevant to the question

1987), the Second Circuit concluded that "the procedures mandated by *Hudson* are to be accorded all nonmembers of agency shops regardless of whether the union believes them to be excessively costly." *Id.* at 339. However, the Court limited this broad statement in a footnote, in which it made clear that it was not addressing whether or how *Hudson* applies to small local unions because the local union there was one of "three interlocking organizations"—the local union, the state union, and the NEA.[6] *Id.* at 340 n.2 ("[The district court's] opinion implies that *Hudson* might not require an independent auditor if the union involved were small enough. We need not decide the issue here.") (internal citation omitted).

The Ninth Circuit, in *Prescott v. County of El* Dorado, 177 F.3d 1102 (9th Cir. 1999), *vacated on other grounds*, 528 U.S. 1111 (2000), *reinstated in relevant part*, 204 F.3d 984 (2000), held that, regardless of its accompanying high cost, a state union must conduct a "true audit." *Id.* at 1107-08. The Court left unanswered, however, whether the independent auditor requirement applied to a small local union. *Id.* at 1108. ("We do not decide that each little unit in the [state union] firmament must necessarily be subjected to a separate verified audit of its expenditures . . . ."). In a subsequent case, *Harik v. California Teachers Assn.*, 298 F.3d 863 (9th Cir.

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presented in this case. The local presumption is merely a method for estimating a local union's ratio of chargeable to nonchargeable expenses. At issue here is whether an auditor must verify the total expenses to which that ratio may be applied. *See Hohe*, 956 F.2d at 410 (in a case in which a union attempted to apply the local presumption, holding disclosure to nonmembers inadequate because "[t]he notice . . . to nonmembers did not disclose the affiliated locals' 'major categories of expenses' nor was there any assertion that the locals' categories of expenses mirrored those of [the state union.]").

[6] While *Andrews* did not provide any basis for us to determine whether the local unions at issue were larger than SAEA, we note that SAEA too is part of "three interlocking organizations"—SAEA, PSEA, and NEA.

2002), the Court held that a small local union must obtain "independent verification" of its expenses, but need not obtain a "formal audit." *Id.* at 866. The *Harik* Court did not discuss precisely what "independent verification" entails and how it differs from the "true audit" *Prescott* required of larger unions.

We hold that every union collecting fair-share fees from non-members must subject its disclosed financial information to independent auditor verification. The Supreme Court's mandate cannot be bent simply because the cost to the union is great. The Supreme Court implied no intent to make the audit requirement depend on the size of the reporting union. Absent a directive by the Court, we likewise make no exception.

But what level of independent auditor verification does *Hudson* require? Broadly speaking, auditors can provide three different types of accounting services: compilations, reviews, and audits. A compilation is the "lowest level of assurance" regarding an entity's financial statements. Christian Tregillis, *Overview of Services Provided by CPAs, in Basics of Accounting & Finance: What Every Practicing Lawyer Needs to Know* 88 (PLI Corp. Law & Practice Course, Handbook Series No. B-1064, 1998). It expresses "neither an opinion nor any level of assurance." *Id.* When performing a compilation, an accountant need not "verify or corroborate the financial statement information provided by the client." Jane Dillard-Eggers, *Understanding Compilations, Reviews, and Audits*, *at* http://www.tscpa.com/public/smallbusiness articles/ understanding_compilations.htm.

A review involves an intermediate level of scrutiny in which the auditor provides "limited assurance" on the entity's financial statements. *See id.* In so doing, the auditor indicates that he "is not aware of any material modifications needed to be in conformity with [generally accepted accounting principles, also known as GAAP.]" Tregillis,

supra, at 88. In order to provide this "limited assurance," the auditor must make some, but not comprehensive, inquiry into client management, accounting practices, internal control structure, and analytical procedures used by the organization. *See* Dillard-Eggers, *supra.* The scope of the "inquiry and analytical procedures are the major difference between a review and a compilation." Larry P. Bailey, *GAAS Guide*: *A Comprehensive Restatement of Generally Accepted Auditing Standards* 16.31 (1994).

In an audit, which provides "the highest level of assurance on financial statements," the accountant "provides *verification* of the financial statements' claims and assertions" and expresses an opinion on the entity's financials. Tregillis, *supra*, at 85 (emphasis added). Among other procedures, the accountant "consider[s] and evaluate[s] . . . the internal control system of the [client] . . . [and] tests . . . the underlying documentation to support account balances." Dillard-Eggers, *supra*; *Bailey*, *supra*, at 16.51. Annual audits are required for all publicly traded companies. Tregillis, *supra*, at 85.

As between a review and an audit, "[a] review may bring to the accountant's attention significant matters affecting the financial statements, but it does not provide assurance that the accountant will become aware of all significant matters that would be disclosed in an audit." 1 John R. Clay *et al.*, *Guide to Compilation and Review Engagements* § 101.5 (24th ed. 2002). This is because "a review does not contemplate obtaining an understanding of the internal control structure or assessing control risk; tests of accounting records and of responses to inquiries by obtaining corroborating evidential matter through inspection, observation or confirmation; and certain other procedures ordinarily performed during an audit." *Id.*

We hold that local unions, regardless of their size, are required to obtain formal audits of their financial statements.

Compilations and reviews do not provide an adequate basis for a non-member to decide whether to object to a fair-share fee. *See Prescott*, 177 F.3d at 1107 ("[A]n audit, as opposed to a review, offers at least some verification of the amounts disclosed in the financial statement. . . . We do not see how a mere review of the union's records can offer the 'verification' that the Supreme Court and we have spoken of."). Indeed, "verification"—the word used by the Supreme Court in *Hudson*, 475 U.S. at 307 n.18, and by at least one accounting authority in describing an audit, *see* Tregillis, *supra*, at 85—means authenticating or confirming the truth or accuracy of a statement. *Webster's Third New Int'l Dictionary of the English Language Unabridged* 2543 (1971). Put another way, an audit "make[s] assurance double sure." William Shakespeare, *Macbeth* act 4, sc. 1, line 96 (W.J. Craig, ed., Oxford 1914). A review—testing merely to be aware of the need for material modifications to financial disclosures—does not.[7]

We take no position on the precise procedures an accountant must follow when auditing a local union.[8] Like

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[7] We recognize that accountants review rather than audit public corporations' interim financial statements, D. Edward Martin, *Attorney's Handbook of Accounting, Auditing and Financial Reporting* § 13.03[1] (4th ed. 2002), and that investors rely on these unaudited interim financial statements when making investment decisions. Despite this industry practice, we believe that, until the Supreme Court tells otherwise, *Hudson* forecloses the argument that a review is acceptable in this context.

[8] However, we read literally *Hudson*'s requirement of auditor independence and therefore require that the accountant performing the audit be truly independent of the local union, *i.e.*, not an accountant employed in-house by the union. *See Ferriso v. NLRB*, 326 U.S. App. D.C. 338, 125 F.3d 865, 871-73 (D.C. Cir. 1997) (holding that *Hudson* requires an auditor to have "independence and qualifications [that] conform to prevailing norms for audits of comparable entities."). *But see Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1017 (7th Cir. 1998) (Posner, J.) (explicitly declining to follow *Ferriso* because "'[i]ndependence is a slippery term" and cases requiring absolute independence failed to "consider alternatives" and are "in tension with

the Second Circuit in *Andrews*, 829 F.2d at 340, and the Sixth Circuit in *Gwirtz v. Ohio Education Association*, 887 F.2d 678, 680 (6th Cir. 1989), we decline to hold either that an accountant's audit procedures must constitute the "least restrictive process imaginable," *Andrews*, 829 F.2d at 340, or that local unions must obtain the "'highest' possible level of audit service," *Gwirtz*, 887 F.2d at 680. *See generally Prescott*, 177 F.3d at 1107 (noting that audits "may vary in procedures and sampling rates"). We do note, however, that *Hudson* does not require absolute precision within the audit context. *See Hudson*, 475 U.S. at 307 n.18 ("We continue to recognize that there are practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.'") (quoting *Allen*, 373 U.S. at 122) (alteration in original).[9]

We recognize that our decision might place high costs on some local unions. However, non-members' *First Amendment* freedoms may not be eroded simply because they are costly to enforce. Further, local unions are not without options. For example, unions without the financial wherewithal to afford the *Hudson*-mandated audit might choose to enter into combinations with other small unions to achieve necessary

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cases . . . that hold that dissenters are not entitled to the highest level of audit services that the market offers").

[9] In this vein, we follow other circuits that have held that the independent audit requirement does not require the auditor to verify the local union's classification of expenses as chargeable or nonchargeable. *See, e.g., Dashiell v. Montgomery County, Md.*, 925 F.2d 750, 755-56 (4th Cir. 1991); *Gwirtz*, 887 F.2d at 682 n.3; *Ping v. National Education Asso.*, 870 F.2d 1369, 1374 (7th Cir. 1989); *Andrews*, 829 F.2d at 340. We agree with these circuits that chargeability is a legal question. *Dashiell*, 925 F.2d at 755-56; *Gwirtz*, 887 F.2d at 682 n.3; *Ping*, 870 F.2d at 1374; *Andrews*, 829 F.2d at 340. To require an accountant to verify that a union has correctly classified expenditures is "tantamount to requiring the auditor to give a second legal opinion," *Dashiell*, 925 F.2d at 756, which is clearly beyond the scope of an auditor's duties.

economies of scale. In the alternative, state or national unions might choose to subsidize the cost of local unions' audits.

C. Litigation Expenditures

Plaintiffs' fair-share fees include charges for collective-bargaining-related litigation conducted by PSEA or its affiliates but unrelated specifically to the SAEA unit. Such expenses are known as extra-unit litigation expenses. Plaintiffs contend that the extra-unit litigation expenses at issue are nonchargeable. *See Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exps., & Station Employees*, 466 U.S. 435, 453, 80 L. Ed. 2d 428, 104 S. Ct. 1883 (1984) (holding certain litigation expenses not incurred on behalf of non-members' bargaining unit unchargeable to those non-members). The Unions argue that, because the litigation expenses at issue are "pooled" across PSEA affiliates, these expenses are chargeable to non-union members. *See Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 524, 114 L. Ed. 2d 572, 111 S. Ct. 1950 (1991) (holding that a union may charge non-members for their *pro rata* share of certain expenses incurred pursuant to a cost-sharing agreement with affiliate unions). This case thus requires us to address an expense-chargeability issue that lies in the intersection of the *Ellis* and *Lehnert* holdings: whether a union may charge non-members for their *pro rata* share of expenses that relate to litigation *and* that were incurred on behalf of an affiliate union pursuant to a cost-sharing agreement.

As noted, *Ellis* holds that a union may not charge non-union members for certain extra-unit litigation expenses.[10]

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[10] Examples of the challenged litigation in *Ellis* included "the union's challenge to the legality of the airline industry's Mutual Aid Pact, under which a struck carrier receives substantial financial assistance from non-struck carriers; the protection of employees' rights during bankruptcy proceedings involving an employer; the doctrine of fair representation; and the defense of suits alleging violation of the non-discrimination requirements of Title VII." *Ellis v. Brotherhood of Ry.*, 685 F.2d 1065,

Ellis, 466 U.S. at 453 (while expenses of collective-bargaining-related litigation arising from the non-members' bargaining unit are "clearly chargeable" to that employee, "[t]he expenses of litigation not having such a connection with the [non-members'] bargaining unit are not to be charged to objecting employees").[11] But *Ellis* did not involve expenses incurred by an affiliate bargaining unit pursuant to an expense-pooling arrangement with that affiliate. Here, PSEA and its affiliates have agreed to pool their litigation expenses for the unions' mutual benefit. This case therefore presents a significantly different question than *Ellis*. Even if a local union party to such an arrangement does not litigate in any given year, it still derives a tangible benefit from participating in an expense-pooling agreement: the availability of on-call resources greater than those it could muster individually. *Cf. Finerty v. NLRB*, 324 U.S. App. D.C. 346, 113 F.3d 1288, 1292 (D.C. Cir. 1997) ("It is indisputable that, by pooling its resources on a union-wide basis, a union, which is the bargaining representative of *all* its members, provides some benefit to members of the various local unions.") (emphasis in original). Moreover, it is unclear whether the *Ellis* Court would have reached the same result if the extra-unit litigation at issue were more related to the

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1073 (9th Cir. 1982), *aff'd in part and rev'd in part*, 466 U.S. 435, 80 L. Ed. 2d 428, 104 S. Ct. 1883 (1984).

[11] While *Ellis* interpreted the Railway Labor Act ("RLA") rather than the *First Amendment*, subsequent cases have suggested that RLA cases such as *Ellis* "necessarily provide some guidance regarding what the First Amendment will countenance in the realm of union support of political activities through mandatory assessments." *Lehnert*, 500 U.S. at 516; *see also Romero v. Colegio De Abogados De P.R.*, 204 F.3d 291, 298 (1st Cir. 2000) ("Although the decision [in *Ellis*] turned on a statutory interpretation of the Railway Labor Act, the Court was clear that its interpretation was required to avoid constitutional difficulty. Later cases have interpreted *Ellis* as setting forth constitutional rules . . . .") (internal citations omitted).

collective bargaining activities of the *Ellis* plaintiffs' bargaining unit. In other words, it is unclear whether the Court intended to state a *per se* rule against the chargeability of extra-unit litigation expenses.

In *Lehnert*, the Supreme Court held that a union may charge non-union members for their *pro rata* share of expenses incurred on behalf of affiliate bargaining units when there is "some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Lehnert*, 500 U.S. at 524.[12] A majority of the Court in *Lehnert* reached this conclusion by applying a three-part test to assess whether a particular union affiliate's expense is chargeable to non-members of the union. "[C]hargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Id.* at 519.[13] However, when the *Lehnert* Court attempted to apply this test to a question similar to the one before us—whether expenses for reporting on extra-unit litigation, where litigation expenses are incurred pursuant to a cost-pooling agreement with an affiliate union, are chargeable to non-members of the local bargaining unit—no five justices agreed.

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[12] The dissent also endorsed this result, even though it would have reached that conclusion through a different analytical path. *See Lehnert*, 500 U.S. at 561-62 (Scalia, J., concurring in the judgment in part and dissenting in part).

[13] While this test was in a plurality opinion of Chief Justice Rehnquist and Justices Blackmun, White and Stevens, *see Lehnert*, 500 U.S. at 519, a fifth justice, Justice Marshall, joined the portion of the plurality opinion containing the test, *see id.* at 534 (Marshall, J., concurring in part and dissenting in part).

Justice Blackmun, joined by Chief Justice Rehnquist and Justices White and Stevens, noted that dissenting employees may not be charged for the costs of union literature reporting on extra-unit litigation because they cannot be charged for such litigation itself under *Ellis Id.* at 528. He acknowledged that litigation conducted by one bargaining unit could establish precedents useful to another bargaining unit. But he concluded that this potential benefit was too attenuated and that "extraunit litigation [is] more akin to lobbying [which is not chargeable] in both kind and effect." *Id.*[14] Were Justice Blackmun able to garner five justices' votes for the proposition that extra-unit litigation is not chargeable to non-union members, *Lehnert* would control here. However, as we discuss, he wrote only for a plurality of four.

Justice Scalia, joined by Justices O'Connor and Souter, "agree[d] with the Court's disposition of many of the challenged expenditures," but disagreed with the majority's three-part test for evaluating the chargeability of expenditures. *Lehnert*, 500 U.S. at 550 (Scalia, J., concurring in the judgment in part and dissenting in part). Rather, Justice Scalia would permit expenses to be charged to non-members when those expenses are incurred as part of "the union's statutory duties as exclusive bargaining agent." *Id.* However, he did not apply his preferred test to the question whether dissenting employees could be charged for the expenses of union reporting on extra-unit litigation (or for the expenses of extra-unit litigation itself).

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[14] Justice Marshall, who otherwise concurred in Justice Blackmun's opinion, emphasized that *Lehnert* concerned the chargeability of a union's *reporting* on extra-unit litigation. Chargeability of reporting is different from chargeability of the litigation itself. This disagreement about the scope of the issues before the Court led Justice Marshall to dissent on this issue. He would have held reporting on extraunit litigation expenses chargeable, "particularly since the publication costs at issue are *de minimis*" and involved only "a few pennies." *Lehnert*, 500 U.S. at 534, 546. (Marshall, J., concurring in part and dissenting in part).

Justice Kennedy, who endorsed Justice Scalia's rather than Justice Blackmun's chargeability test, wrote separately to argue that extra-unit litigation expenditures should be allowed if "undertaken in the course of the union's duties as exclusive bargaining representative." *Lehnert*, 500 U.S. at 563 (Kennedy, J., concurring in the judgment in part and dissenting in part). He criticized Justice Blackmun's reliance on *Ellis* to resolve the question whether costs of reporting on extra-unit litigation are chargeable, pointing out that *Ellis* did not address a litigation-cost-sharing arrangement. *Id.* at 564.

Despite the fact that no five justices explicitly agreed on the chargeability of expenses arising from extra-unit litigation, plaintiffs insist that *Lehnert* controls our disposition of the litigation-expenditures issue. They contend that because Justice Scalia was clear when he disagreed with the Court's rulings on other expenditures, he must have agreed with Justice Blackmun's position that extra-unit litigation expenditures are not chargeable. We disagree with the plaintiffs' interpretation of Justice Scalia's opinion, for his silence is inconclusive.[15] We are therefore left without definitive

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[15] We note that application of Justice Scalia's chargeability standard does not necessarily result in the prohibition against pooled extra-unit litigation expenses that Justice Blackmun espoused. A union's incurring extra-unit litigation expenses might, under some circumstances, be "essential to [the union's] discharge of its duties as bargaining agent." *Lehnert*, 500 U.S. at 560 (quoting *Ellis*, 466 U.S. at 448-49) (Scalia, J., concurring in the judgment in part and dissenting in part). Moreover, Justice Scalia's willingness to consider as a chargeable expense an annual fee assessed by a national union to a local bargaining unit to ensure the availability of on-demand services, *id.* at 561-62, suggests that he might also be willing to consider as chargeable a local bargaining unit's *pro rata* share of pooled litigation expenses. That *pro rata* assessment is essentially an annual fee to ensure the availability of litigation resources to the local unit—a form of insurance. We therefore disagree with the Tenth Circuit's conclusion in *Pilots Against Illegal Dues v. Air Line Pilots Association*, 938 F.2d 1123, 1130 n.4 (10th Cir. 1991), that a majority of the *Lehnert*

Supreme Court guidance. *See Planned Parenthood of S.E. Pa. v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991), *aff'd in part and rev'd in part*, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) (stating that a putative majority standard must "necessarily produce results with which a majority of the Court from that case would agree").

The Sixth Circuit, the Court of Appeals from which *Lehnert* was appealed to the Supreme Court, addressed the issue before us in *Reese v. City of Columbus*, 71 F.3d 619 (6th Cir. 1995). The Court agreed with Justice Marshall that the *Lehnert* plurality's statement on extra-unit litigation expenses was "no more than *dicta*" because at issue was the cost of reporting on extra-unit litigation. *Id.* at 623-24. It then proceeded to find that *Lehnert* not only allowed, but required, it to approve the charges "because a majority [in *Lehnert*] approved of charges for pooled expenses like those in this case." *Id.* at 624. While *Reese* overstates *Lehnert*'s holding, as the *Lehnert* majority never held extra-unit litigation expenses incurred pursuant to a pooling agreement to be chargeable, we nonetheless agree with the Sixth Circuit's conclusion.

Moreover, in *International Association of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), the Seventh Circuit enforced an NLRB decision in which the NLRB rejected as a matter of law the proposition that extra-unit litigation expenses should be treated differently from other extra-unit expenses and instead "appl[ied] the same standard for determining the chargeability of litigation expenses as we are required . . . to apply to all other expenses." *Cal. Saw & Knife Works*, 320 N.L.R.B. 224, 239 (1995). The Seventh Circuit agreed that litigation expenditures are "analytically identical" to other expenditures

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Court would not allow extra-unit litigation expenses incurred pursuant to a pooling agreement to be charged to non-union members.

related to collective bargaining. *International Ass'n of Machinists & Aerospace Workers*, 133 F.3d at 1016.

We too uphold the chargeability of the extra-unit litigation expenses at issue by applying the *Lehnert* majority's three-part chargeability test: "chargeable activities must (1) be 'germane' to collective-bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding 'free riders'; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop." *Lehnert*, 500 U.S. at 519. First, that the litigation expenses at issue were incurred pursuant to an expense-pooling arrangement makes the *pro rata* share of those expenses charged to SAEA members and non-members akin to insurance. *See id.* at 523 (noting that because "[t]he essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them," the portion of a local's fair-share fee that "contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year"). The "premium" that SAEA members and non-members pay, in the form of a *pro rata* share of litigation expenses, ensures that the local bargaining unit will have sufficient resources at its disposal should it need, in the future, to engage in collective bargaining-related litigation (which would be chargeable to non-union members). Because the extra-unit litigation expenditures at issue ensure the availability of resources for collective-bargaining-related litigation, those expenditures are germane to collective-bargaining activity.

Applying the second prong of the *Lehnert* test, we note that the free-rider concerns applicable to other pooled-expense arrangements apply with equal force to extra-unit litigation expenditures.

Third, extra-unit litigation expenses present "little additional infringement of First Amendment rights beyond that already accepted," *Ellis*, 466 U.S. at 456, where, as here, the pooled litigation resources are expended on collective-bargaining-related activities and "may ultimately inure to the benefit of the members of the local union," *Lehnert*, 500 U.S. at 524. That non-litigation, collective-bargaining-related expenses for, *inter alia*, pooled negotiating advice and informational assistance in *Lehnert* are chargeable to objecting employees informs our conclusion.

Unlike the Justice Blackmun camp in *Lehnert*, we discern no compelling reason to treat litigation expenses incurred pursuant to a pooling agreement differently from other pooled expenses. Thus we conclude that they are chargeable to SAEA's non-members.

D. Multi-occupational representation

In addition to providing services to education professionals, PSEA's affiliated local associations also provide collective-bargaining-related services to healthcare professionals. When PSEA calculates the expenses chargeable to fair-share payers, it does not allocate chargeable costs by profession. Rather, it includes as part of fair-share fees the expenses incurred on behalf of all represented employees, *i.e.*, educators and healthcare professionals. Plaintiffs argue that the First Amendment bars PSEA from passing onto them costs incurred on behalf of healthcare professionals because PSEA has not shown that those costs "may ultimately inure to [their education unit's] benefit . . . by virtue of [its] membership in [PSEA]." *Lehnert*, 500 U.S. at 524.

The District Court granted summary judgment in favor of the Unions, holding that the plaintiffs failed to allege facts suggesting that any of the three *Lehnert* requirements were not satisfied (to repeat, that the expenditures are not "'germane' to collective-bargaining activity," not "justified

by the government's vital policy interest in labor peace and avoiding 'free riders,'" or that they "significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop"). In so doing, the District Court improperly placed the burden of proof on the plaintiffs when it belonged on the Unions. As *Lehnert* points out, "[t]he union [bore] the burden of proving the proportion of chargeable expenses to total expenses." *Id.*

Because plaintiffs do not challenge any particular expenditures, we evaluate, as a matter of law, whether PSEA may pool costs across occupational groups. We answer this question affirmatively. As discussed above, *Lehnert* held that "a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit," so long as there is "some indication that the payment is for services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent organization." *Id.*

In our case, the pooling arrangement confers potential benefits on the plaintiffs. First, the arrangement generates economies of scale that redound to their benefit. Second, by spreading the costs of otherwise-chargeable expenses over a pool of employees whose chargeable-expense levels are not perfectly correlated with their own (*i.e.*, healthcare professionals as well as education professionals), education professionals reduce their risk of being assessed unusually high chargeable expenses in any given year. Moreover, this pooling arrangement does not necessarily increase the dollar amount of chargeable expenses assessed to plaintiffs for any particular year. Just as education professionals are assessed for healthcare professionals' chargeable expenses, so too healthcare professionals are assessed for education profes-

sionals' chargeable expenses. As PSEA correctly points out, this arrangement may result in lower fair-share fees than would have been assessed in the absence of such an arrangement.

We also note that the *Lehnert* Court did not limit its holding only to bargaining units within the same industry, or within related industries. Instead, it stated a broad principle: "that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year." *Id.* at 523. Though this reasoning was not that employed by the District Court, it nonetheless supports its ultimate grant of summary judgment to the Unions.[16]

IV. CONCLUSION

We reverse the District Court's grant of summary judgment in favor of the plaintiffs on the issue of charging them fair-share fees for extra-unit litigation expenses. In all other respects, we affirm.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[16] We may affirm for any reason supported by the record, even if not relied on by the District Court. *Nicini v. Morra*, 212 F.3d 798, 805 (3d Cir. 2000).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed April 8, 2003]

No. 01-3858

MARSHA OTTO; F. NAYLOR EMORY; DENNIS A. ERB; ROBERT K. GILBERT; JAMES W. LOSSELL; BARBARA J. MCALLEY; WESLEY S. SEMPLE, On behalf of themselves and all other non-members similarly situated,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION; NATIONAL EDUCATION ASSOCIATION; SHALER AREA EDUCATION ASSOCIATION, On behalf of themselves and all other local associations similarly situated,

Appellants,

No. 01-4110

MARSHA OTTO; F. NAYLOR EMORY; DENNIS A. ERB; ROBERT K. GILBERT; JAMES W. LOSSELL; BARBARA J. MCALLEY; WESLEY S. SEMPLE, On behalf of themselves and all other non-members similarly situated,

Appellants,

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION; NATIONAL EDUCATION ASSOCIATION; SHALER AREA EDUCATION ASSOCIATION, On behalf of themselves and all other local associations similarly situated,

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 96-cv-01233)
District Judge: Honorable Yvette Kane

Argued June 27, 2002
Before: AMBRO and STAPLETON, *Circuit Judges*, and
O'NEILL,* *District Judge.*

ORDER AMENDING SLIP OPINION

AMBRO, Circuit Judge:

It is now ordered that the published Opinion in the above case filed April 3, 2003, be amended as follows:

On page 12 on the second and third lines of the carryover paragraph delete "—testing merely to be aware of the need for material modifications to financial disclosures—". On page 12, in the first full paragraph, after the word "accountants" and before the word "procedures", insert "audit". In the following sentence (beginning "We do note, however, . . ."), insert the phrase "within the audit context" at the end of the sentence.

By the Court,

/s/ Thomas L. Ambro
THOMAS L. AMBRO
Circuit Judge

* Honorable Thomas N. O'Neill, Jr., United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Dated: April 8, 2003

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 1:CV-96-1233

(Complaint Filed 07/02/96)
(Judge Kane)

(Judge Muir for ripe motions only)

(Magistrate Judge Smyser)

MARSHA OTTO, *et al.*,

Plaintiffs,

VS.

PENNSYLVANIA STATE EDUCATION ASSOCIATION—NEA, *et. al.*,

Defendants.

ORDER # 1 of

July 3, 2000

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

On July 2, 1996, Marsha Otto, F. Naylor Emory, Dennis A. Erb, Robert K. Gilbert, James W. Lossel, Barbara J. McCalley, and Wesley S. Semple (collectively referred to hereinafter as "Plaintiffs") filed a civil rights complaint pursuant to 42 U.S.C. § 1983[1] and they filed an amended

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[1] Section 1983 reads, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

complaint on August 30, 1996. Named as Defendants in the amended complaint are the Pennsylvania State Education Association—NEA, National Education Association, and Shaler Area Education Association (collectively referred to hereinafter as "Defendants"). The Shaler Area Education Association is the local exclusive collective bargaining representative of the Plaintiffs. The remaining two Defendants are that local union's state and national affiliates. Notwithstanding that representation the Plaintiffs are not members of any of the Defendant unions. The Plaintiffs' claims in this action stem from constitutional challenges to the Defendants' collection of certain fees and the procedures by which those fees have been collected pursuant to The Pennsylvania Fair Share Act, 71 Pa. Stat. § 575 (1990).

The Clerk of Court originally assigned this case to Judge Caldwell and referred it to Magistrate Judge Smyser for preliminary consideration. On December 16, 1997, the case was reassigned to Judge Caputo. On November 30, 1998, the case was reassigned to Judge Kane.[2] On January 13, 1997, Judge Caldwell issued an order in which he succinctly summarized the legal and factual framework of this case as follows

> The Pennsylvania Fair Share Act, 71 Pa. Stat. § 575 (1990), authorizes public employees' unions to collect fair share fees from nonmembers to help defray the cost of the union's exclusive bargaining representation of all employees. *Id.* § 575(b). Fair share fees are calculated as

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deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

[2] On or about June 14, 2000, we agreed to handle the outstanding pretrial motions in this case and the motions were reassigned to us for that purpose.

> the dues paid by union members, less the amounts not employed by the union in its role as exclusive representative. *Id.* § 575(a). The fair share fee is thus a percentage of the full fee paid by the union members.
>
> Because the mandatory collection of fair share fees from nonmembers represents some degree of impairment of the nonmembers[']' First Amendment rights, the union must provide nonmembers with certain procedural safeguards. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301-03, 106 S. Ct. 1066, 1073-74, 89 L. Ed. 2d 232, 243-45 (1986). The nonmember has a right to object to any portion of his or her fees being spent on political activities unrelated to the union's duties as exclusive bargaining representative. *Id.* at 301-02, 106 S. Ct. at 1073, 89 L. Ed. 2d at 244. . . .
>
> Each year, Defendants each make a separate calculation of the percentage of their expenses which will be applied to collective bargaining representation. This percentage is then used to determine the fair share fee to be paid by nonmembers. [The Pennsylvania State Education Association—NEA's and the National Education Association's] calculations are verified by independent audit, but Shaler Area Education Association's are not.

(Document 120, pgs. 2-3).[3]

On October 24, 1997, the parties filed a proposed stipulation providing that Plaintiffs would limit the relief sought to declaratory and injunctive relief on the following three claims: 1) Defendant Shaler Area Education Association's calculation of its fair share fee be verified by an independent

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[3] Because that summary was incorporated into the Report and Recommendation of Magistrate Judge Smyser which is currently before us, and no party has objected to it, we will adopt it and rely upon it in the disposition of this case.

auditor; 2) Plaintiffs may not be charged for Defendants Pennsylvania State Education Association's and National Education Association's expenditures for litigation which does not involve Plaintiffs' bargaining unit; and 3) Plaintiffs may not be charged for Defendant Pennsylvania State Education Association's otherwise chargeable expenditures which involve health care professionals who are also represented by the Defendant Pennsylvania State Education Association. The stipulation further restricted the scope of those claims strictly to the 1994-95 school year. By order dated October 27, 1997, Judge Caldwell approved that stipulation. That order also provides that the parties' requests for attorneys' fees remain before the court for resolution.

On November 6, 1997, the parties filed a joint motion to resolve the case on cross-motions for summary judgment based on a stipulated set of facts filed with the court. Judge Caldwell granted that motion in an order dated November 12, 1997. The cross-motions for summary judgment were referred to Magistrate Judge Smyser.

After the cross-motions for summary judgment were fully briefed, on January 28, 1999, Magistrate Judge Smyser filed a report recommending that each motion for summary judgment be granted in part and denied in part. The Magistrate Judge specifically recommended that judgment be entered in favor of the Plaintiffs on their first and second claims and that judgment be entered in favor of the Defendants on the third claim. All of the parties filed objections to that report and recommendation on February 16, 1999. Although the Defendants requested oral argument on their objections, we are of the view that such argument is neither necessary nor advisable. Those objections have been fully briefed and are ripe for disposition. This order addresses the Magistrate Judge's report and recommendations regarding

the parties' cross-motions for summary judgment, to which each there are objections.[4]

When objections are filed to a report of a magistrate judge, we make a *de novo* determination of those portions of the report or specified proposed findings or recommendations made by the magistrate judge to which there are objections. *United States vs. Raddatz*, 447 U.S. 667, 65 L. Ed. 2d 424, 100 S. Ct. 2406 (1980); 28 U.S.C. § 636(b)(1); M.D. Pa. Local Rule 72.31.

Summary judgment is appropriate only when there is no genuine issue of material fact which is unresolved and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Initially, the moving party has a burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corporation vs. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). This may be met by the moving party pointing out to the court that there is an absence of evidence to support an essential element as to which the non-moving party will bear the burden of proof at trial. *Id.* at 325. We also note that Rule 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 323. Those same standards govern cross-motions for summary judgment. *Continental Ins. Co. vs. Kubek*, 86 F. Supp. 2d 503, 505 n.2 (E.D. Pa. 2000) (Katz, J.) (citing *Appelmans vs. Philadelphia*, 826 F.2d 214, 216 (3d Cir. 1987)). When considering such cross-motions "each motion must be considered separately, and each side must still establish a lack of genuine issues of material fact and that it is entitled to judgment as a matter of

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[4] The only other pending motion is one to intervene which has been filed by Jane Campbell and Barbara Leiby. In a separate order we will rule on that motion.

law." *Nolen v. Paul Revere Life Ins. Co.*, 32 F. Supp. 2d 211, 213 (E.D. Pa. 1998) (Robreno, J.).

When addressing a motion for such a judgment, our inquiry focuses on "whether *the evidence* presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (emphasis added). As summarized by the Advisory Committee On Civil Rules, "the very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed. R. Civ. P. 56 advisory committee's note to 1963 Amendment.

In this case the proof we are examining is strictly limited to the set of stipulated facts submitted by the parties. In such a case, where we are required to "draw inferences from the stipulated facts, we must still resolve them against the moving party and in favor of the nonmoving party." *Luden's, Inc. vs. Local Union No. 6*, 28 F.3d 347, 353 (3d Cir. 1994) (citing cases).

The essential elements of a claim brought pursuant to 42 U.S.C. § 1983 require that the conduct complained of 1) be committed by a person acting under color of state law and 2) the conduct has deprived the plaintiffs of one of their rights, privileges, or immunities secured by the constitution or federal law. *Parratt vs. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other grounds*, *Daniels vs. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). The rights at issue in this case are those grounded in the First and Fourteenth Amendments guaranteeing "the freedom of an individual to associate for the purpose of advancing beliefs and ideas." *Abood vs. Detroit Bd. Of Educ.*, 431 U.S. 209, 233, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1976). That freedom encompasses the right to refuse to associate. *Id.*

In *Abood* the United States Supreme Court addressed constitutional claims brought by non-union member employees challenging a Michigan statute

> authorizing a system for union representation of local governmental employees. A union and a local government employer are specifically permitted to agree to an "agency shop" arrangement, whereby every employee represented by a union—even though not a union member—must pay to the union, as a condition of employment, a service fee . . . .

Id. at 211. A number of the plaintiffs in *Abood* were teachers at a public school. They challenged the constitutionality of both the public-sector union and the use of their service fees for various union activities. *Id.* at 211-14.

In the course of upholding the constitutionality of an agency shop arrangement in the public sector, the Supreme Court in *Abood* reiterated its prior observations that

> to compel employees financially to support their collective bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. . . . The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations

> established by Congress. 'The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagree's with the group's strategy. . . .'

Id. at 222 (quoting *Machinists vs. Street*, 367 U.S. 740, 778, 6 L. Ed. 2d 1141, 81 S. Ct. 1784 (1961). Thus, the degree of infringement upon such employees' First Amendment rights which is inherent in a union-shop arrangement has been justified because of the governmental interest in industrial peace. *Ellis vs. Broth. of Ry., Airline and S.S. Clerks*, 466 U.S. 435, 455-56, 104 S. Ct. 1883, 1896, 80 L. Ed. 2d 428 (1984) (citations omitted).

In *Ellis* the plaintiffs challenged the legality of collecting fees pursuant to a union-shop arrangement which were used to fund six specific activities. The Supreme Court was required to decide whether non-union member funds could constitutionally fund three of those activities. The Court reasoned that

> [a]t a minimum, the union may constitutionally 'expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining.' . . . The issue is whether these [three challenged] expenses involve additional interference with First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest.

Id., 466 U.S. at 456, 104 S. Ct. at 1896.

The United States Supreme Court's most recent relevant decision crystalized the governing standard as follows:

> [t]hus, although the Court's decisions in this area prescribe a case-by-case analysis in determining which

> activities a union constitutionally may charge to dissenting employees, they also set forth several guidelines to be followed in making such determinations. *Hanson* and *Street* and their progeny teach that chargeable activities must (1) be "germane" to collective bargaining activity; (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

Lehnert, et al. vs. Ferris Faculty Ass'n, et al., 500 U.S. 507, 520, 111 S. Ct. 1950, 1959, 114 L. Ed. 2d 572 (1991). We will apply the above-referenced precedent in reviewing the three claims presented in Magistrate Judge Smyser's Report and Recommendation.

The first issue addressed by the Magistrate Judge is whether "Defendant Shaler Area Education Association is required to have its financial disclosure to nonmember 'fair share' feepayers verified by an independent auditor." (Document 120, pg. 10) No party objects to the manner in which Magistrate Judge Smyser framed that issue.

The parties have stipulated to the following two facts: 1) "[Shaler Area Education Association's] membership dues for the 1994-95 school year were $50.00. Its fair-share fee for that year was $45.00," and 2) "[Shaler Area Education Association's] financial statements and its calculations described in paragraph 6 [of the stipulation] were not verified by an independent auditor." (Document 120, pg. 7) No other fact in the stipulation is relevant to this issue.

Based on those facts Magistrate Judge Smyser concluded that a case decided by the United States Supreme Court and a case decided by the Court of Appeals for the Third Circuit have resolved this issue and they dictate that we grant the Plaintiffs' motion for summary judgment on this claim. See *Chicago Teachers Union, Local No. 1 vs. Hudson*, 475 U.S. 292, 106 S. Ct. 1066, 89 L. Ed. 2d 232 (1986); *Hohe, et al.*

vs. Casey, et al., 956 F.2d 399 (3d Cir. 1992). The latter decision was an appeal from a decision rendered by Judge Caldwell in this court.

The Defendants object to that conclusion, contending that the Magistrate Judge has misread and misapplied those cases to the stipulated facts. The foundation underlying that contention is the supposition that the verification-by-audit requirement discussed in *Hudson* and *Hohe* does not apply to "relatively small local unions." (Document 126, pgs. 17-18)

We are of the view that the courts' decisions *Hudson* and *Hohe*, including Judge Caldwell's Memoranda in *Hohe* reported at 695 F. Supp. 814 and 727 F. Supp. 163, refute the Defendants' contentions. In his report and recommendations Magistrate Judge Smyser properly applies *Hudson* and *Hohe*. We elaborate on his treatment of the issue simply to address the Defendants' specific objections.

In *Hudson* the United States Supreme Court stated

> [t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. With respect to an item such as the Union's payment of $2,167,000 to its affiliated state and national labor organizations, . . . , for instance, either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required.

Hudson, 475 U.S. at 307 at footnote 18, 106 S. Ct. at 1076 at footnote 18. In that case the "union" was the local exclusive collective bargaining representative of the plaintiffs. That union directly incurred expenses on behalf of the fair share feepayers and it directly collected those fees from them. In the quoted footnote the Court required that such expenses by

the local union be verified by an audit. However, in that same footnote, the court did not extend the audit requirement to amounts collected by the local union for the expenses of its state and national affiliates. The expenses at the state and national levels should be audited at those levels. The distinction between the expenses incurred by the exclusive collective bargaining representative and those incurred by its state and national affiliates is significant.

In *Hohe* this court, per the Honorable William W. Caldwell, applied the rulings in *Hudson* to a case in which both types of expenses discussed in footnote 18 of *Hudson* were considered (i.e., those incurred directly by the local exclusive collective bargaining representative of the plaintiffs, and those which were actually incurred by its non-local affiliate unions). In separate memoranda decisions, Judge Caldwell concluded that the former expenses are subject to the verification-by-audit requirement and the latter expenses, which he described as "financial information for affiliate unions" is not subject to that requirement. *Hohe vs. Casey*, 695 F. Supp. 814, 818-819 (M.D. Pa. 1988) (Caldwell, J.) ("*Hudson* does not require that each local expenditure be audited."), *aff'd*, 868 F.2d 69 (3d Cir. 1989); *Hohe vs. Casey*, 727 F. Supp. 163, and 956 F.2d 399 (3d Cir. 1992).

The Court of Appeals for the Third Circuit affirmed those conclusions in two separate reported decisions. Id. In its latter decision, the Court of Appeals stated

> [u]nder *Hudson*, Council 13 was required to send nonmembers notice that included "the major categories of expenses, as well as verification by an independent auditor." . . . On December 11, 1989, the district court determined that "the breakdown of chargeable and non-chargeable expenses . . . were not subjected to verification by an independent auditor as required by *Hudson*." . . . It went on to state that "having found a violation of plaintiff's first amendment rights in the

> unions' *Hudson* procedure, we must determine *an appropriate remedy*."

Hohe, 956 F.2d at 415 (emphasis in original). Judge Caldwell concluded the appropriate remedy for failing to verify the expenses by an independent auditor was nominal damages of $1.00 to each plaintiff. The Court of Appeals affirmed that conclusion. *Id.*

None of those reported decisions draws a distinction based on the size of the union. It appears to us that all of the authority cited by Defendants relates to "financial information for affiliate unions." The relevant distinction is whether the fees at issue are used by the direct exclusive collective bargaining representative or simply an affiliate thereof. We are of the view that "financial information for affiliate unions", which need not be verified by an audit, is not at issue in this case.

For those reasons, we agree with the Magistrate Judge that the portion of the fee charged to Plaintiffs for expenses incurred directly by their local exclusive collective bargaining representative is required to be verified by an audit. The Plaintiffs are entitled to a declaratory judgment that the constitution requires Shaler Area Education Association to provide nonmembers a financial statement of its expenses that has been audited.

The fundamental issue underlying the second claim is whether the Plaintiffs "may not be charged, as plaintiffs allegedly have been charged by defendants [Pennsylvania State Education Association-NEA and National Education Association], for litigation expenditures incurred in litigation not relating specifically to the plaintiffs' own collective bargaining unit." (Document 120, pg. 13) The Magistrate Judge recommends we declare that Defendants Pennsylvania State Education Association and National Education Association are precluded from collecting those expenses from objecting feepayers and enjoin the collection of those costs

from the Plaintiffs. This recommendation is based on his reading of the Supreme Court Justices' four separate opinions in *Lehnert vs. Ferris Faculty Ass'n*, 500 U.S. 507, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991), and that court's earlier decision in *Ellis vs. Broth. of Ry., Airline and S.S. Clerks*, 466 U.S. 435, 104 S. Ct. 1883, 80 L. Ed. 2d 428 (1984).

Justice Blackmun wrote the opinion of the court in Lehnert. In one portion of his opinion he stated that

> [w]hen unrelated to an objecting employee's unit, such activities are not germane to the union's duties as exclusive bargaining representative. Just as the Court in *Ellis* determined that the RLA, as informed by the First Amendment, prohibits the use of dissenters' fees for extraunit litigation, . . . , we hold that the Amendment proscribes such assessments in the public sector.

Lehnert, 500 U.S. at 528, 111 S. Ct. at 1964 (1991). A total of four Justices joined in that portion of Justice Blackmun's opinion.

The Defendants object to the recommendation on the grounds that the Magistrate Judge has again misread those cases. They specifically argue that 1) the discussion of extra-unit litigation costs in Lehnert is *dicta* and therefore irrelevant; 2) no position of any Justice in Lehnert on the issue commanded a majority of Justices; and 3) the Ellis case is inapplicable.

Although we agree that the Justices' comments on extra-unit litigation costs in *Lehnert* are *dicta*, the Court of Appeals for the Third Circuit has stated that

> we should not idly ignore considered statements the Supreme Court makes in dicta. The Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket.

McDonald vs. Master Financial, Inc., et al, 205 F.3d 606 (3d Cir. 2000) (noting that appellate courts which ignore dicta

"frustrate the evenhanded administration of justice by giving litigants an outcome other than the one the Supreme Court would be likely to reach were the case heard there"). We will pay heed to Justice Blackmun's opinion on the question of extra-unit litigation fees, as did Magistrate Judge Smyser.

The relevant paragraph of Justice Blackmun's opinion, which we have quoted above, garnered the concurrence of a total of four Justices. Magistrate Judge Smyser reads Justice Scalia's concurring opinion, in which Justices O'Connor, Souter, and Kennedy joined, as the votes tipping the scales in Plaintiffs favor on this issue. In order to weigh the significance of Justice Scalia's concurrence, it is necessary to review the United States Supreme Court's prior holding in *Ellis vs. Broth. of Ry., Airline and S.S. Clerks*, 466 U.S. 435, 104 S. Ct. 1883, 80 L. Ed. 2d 428 (1984).

In *Ellis* the Court held that it was unlawful for objecting employees to be charged for the expenses of litigation which did not concern bargaining unit employees and was not normally conducted by the exclusive bargaining representative. *Ellis*, 466 U.S. at 453, 104 S. Ct. at 1895. The Court's analysis in *Ellis* was admittedly based on the statutory interpretation of the Railway Labor Act. However, in his concurring opinion in *Lehnert*, Justice Scalia construed *Ellis* "as merely reflecting the constitutional rule." As noted above, Justices O'Connor, Souter, and Kennedy joined in that portion of Justice Scalia's opinion. We are of the view that Magistrate Judge Smyser has correctly interpreted and applied those cases.

That view is further supported by a decision of the United States Court of Appeals for the First Circuit. In *Romero vs. Colegio De Abogados De Puerto Rico, et al.*, 204 F.3d 291 (1st Cir. 2000), a panel of judges of that court considered an issue similar to the one currently before us and stated

> [a]lthough the decision [in Ellis] turned on a statutory interpretation of the Railway Labor Act, . . . the Court

> was clear that its interpretation was required to avoid constitutional difficulty, . . . Later cases have interpreted Ellis as setting forth constitutional rules, see *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 472, 117 S. Ct. 2130, 138 L. Ed. 2d 585 (1997); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516, 111 S. Ct. 1950, 114 L. Ed. 2d 572 (1991), . . .

Romero, 204 F.3d at 298.

Based on the authority noted above, we adopt Magistrate Judge Smyser's second recommendation and will 1) declare that the Defendants can not constitutionally charge Plaintiffs for the extra-unit litigation expenses at issue in this case and 2) enjoin the Defendants from collecting fees based on those expenses.

The Magistrate Judge's third and final recommendation is that summary judgment be entered in favor of the Defendants because the Plaintiffs have not discharged their burden to show that they are entitled to relief on their third claim. The Plaintiffs object to that recommendation on the ground that 1) the Magistrate Judge erroneously shifted the burden of proof onto them in spite of Supreme Court case law placing the burden on the Defendants; and 2) the stipulated facts are sufficient to establish the constitutional violation asserted in the third claim.[5]

As noted above, a plaintiff in a § 1983 action has the burden of showing that the defendant's conduct has deprived

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[5] The Defendants filed a brief in opposition to the Plaintiffs' objections in which they state "while defendants agree with the result [as to the third claim] we do not embrace all of the reasoning by which the Report arrives at that conclusion." The majority of their brief is, in essence, a document containing additional objections to the Magistrate Judge's report and recommendations. Because that document was not filed within the time allowed for such objections, we will not consider the objections contained therein. *See* M.D. Local Rule 72.3.

the plaintiff of one of his or her rights, privileges, or immunities secured by the constitution or federal law. *Parratt vs. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other grounds*, *Daniels vs. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). Although Magistrate Judge Smyser did not explicitly cite *Parrat*, *supra.*, as the authority supporting his conclusion as to the burden of proof, that case most definitely applies. The cases cited by the Plaintiffs regarding allocation of the burden of proof address the issue in subsequent stages of the case. We agree with Magistrate Judge Smyser's recommendation that the Plaintiffs have the prima facie burden of establishing the elements of a § 1983 claim.

Based on the principles set forth in *Hanson*, *Street*, *Abood*, *Ellis*, and *Lehnert*, the Plaintiffs here can meet that burden only by showing that the activities for which they have been charged (1) are not "germane" to collective bargaining activity; (2) are not justified by the government's vital policy interest in labor peace and avoiding "free riders"; *or* (3) significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop. *Lehnert, et al. vs. Ferris Faculty Ass'n, et al.*, 500 U.S. 507, 520, 111 S. Ct. 1950, 1959, 114 L. Ed. 2d 572 (1991).

The only three relevant stipulated facts are that

15. PSEA's affiliated local associations represent the following types of employees: (a) teachers and other education professionals (103,712 employees in 608 bargaining units during the 1994-95 school year); (b) education support personnel (21,391 employees in 371 bargaining units during 1994-95); and (c) health-care professionals, in both the public and private sectors (approximately 1, 548 employees in 6 bargaining units during 1994-95).

16. PSEA provides generally the same kinds of services to all of its affiliated local associations, and to the members of their bargaining units, regardless of which type of employee the local association represents.

17. In calculating its dues percentage that is chargeable to fair-share feepayers, PSEA considers all of its expenditures together, calculating the ratio of all of its chargeable expenditures to all of its expenditures-rather than treating separately, and calculating separate chargeable percentages for, its expenditures attributable to services provided to educational professionals, educational support personnel, and health-care professionals.

(Document 102, paras. 15-17) The stipulated evidentiary record submitted by the parties does not provide sufficient facts for us to determine whether the activities funded by the fees relating to the Plaintiffs' third claim either (1) are not "germane" to collective bargaining activity, (2) are not justified by the government's vital policy interest in labor peace and avoiding "free riders", or (3) significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop. Consequently, those facts do not support the conclusion that the Plaintiffs' constitutional rights relating to that claim have been violated.

With respect to their summary judgment motion, the Plaintiffs have failed to discharge their initial burden of demonstrating, with any information of record, the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Fed. R. Civ. P. 56(c), (e); M.D. Pa. Local Rules 5.4, 7.3, 56.1. The Plaintiffs are not entitled to summary judgment on that claim.

We next consider how the absence of critical facts in the record affects the Defendants' motion for summary judgment. We are of the view that the Magistrate Judge correctly notes

that there is an absence of evidence to support essential elements of the Plaintiffs' third claim on which the Plaintiffs bear the burden of proof. The absence of those facts weighs in Defendants' favor because Federal Rule of Civil Procedure 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation vs. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). We will grant the Defendants' motion for summary judgment on the third claim.

In closing, we note the potential significance of Federal Rule of Civil Procedure 39, entitled "Trial by Jury or by the Court." Subsection (a) of that rule, entitled "By Jury," provides in part that "the trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court . . . consent to trial by the court sitting without a jury." Fed.R.Civ.P. 39(a).

On October 24, 1997, the parties jointly filed a stipulation and settlement agreement which provided in relevant part that the parties had reached an agreement "in order to resolve without further litigation certain issues involved in this lawsuit, and to provide for the simplified and expeditious judicial resolution of those issues that remain unresolved." (Document 101, pg. 1) In the third paragraph of that document, the parties stipulate that the three remaining claims in this case "shall remain for judicial resolution." (Document 101, pg. 2, para. 3) In the fifth paragraph of that document "the parties agree that no further discovery will be necessary for litigation of the remaining issues in this case." (Document 101, pg. 3, para. 5)

In their joint motion to establish the procedures for their cross-motions for summary judgment, which was filed on November 6, 1997, the parties described their October 24, 1997, documents as "reserving three questions of law for

adjudication by this Court pursuant to the stipulated facts." (Document 104) On November 12, 1997, the Honorable William W. Caldwell granted that motion, which allowed the parties to deviate from the standard local rules relating to motions for summary judgment. (Document 105)

Although Rule 39(a) is not referenced in any of the documents filed by the parties, we will construe their stipulation, settlement agreement, and motion for summary judgment collectively as a Rule 39(a) stipulation that we may resolve the three remaining claims based solely on the stipulated facts. Our view is based primarily on the language employed in their filings seeking "expeditious judicial resolution" of those claims. We also note that no party has objected to the Magistrate Judge's report on the basis that additional facts should be supplied to the court, or that the case should be listed for trial on the third claim.

NOW, THEREFORE, IT IS ORDERED THAT:

1. The report and recommendation of Magistrate Judge Smyser is adopted.

2. Plaintiffs' objections to that report and recommendation are overruled.

3. Defendants' objections to that report and recommendation are overruled.

4. Plaintiffs' motion for summary judgment (Doc. 106) is granted in part and denied in part as set forth in PP 5, 6, and 7 hereafter.

5. Plaintiffs' motion for summary judgment (Doc. 106) on the claim that Defendant Shaler Area Education Association's calculation of its fair share fee is required to be verified by an independent auditor is granted.

6. Plaintiffs' motion for summary judgment (Doc. 106) on the claim that Plaintiffs may not be charged for

Defendants Pennsylvania State Education Association's and National Education Association's expenditures for litigation which does not involve Plaintiffs' bargaining unit is granted.

7. Plaintiffs' motion for summary judgment (Doc. 106) on the claim that Plaintiffs may not be charged for Defendants' otherwise chargeable expenditures which involve health care professionals who are also represented by the Defendant Pennsylvania State Education Association is denied.

8. A declaratory judgment shall be entered providing that the Defendants can not constitutionally charge Plaintiffs for the extra-unit litigation expenses at issue this case.

9. The Defendants are enjoined from collecting fees based on the extra-unit litigation expenses at issue in this case.

10. Defendants' motion for summary judgment (Doc. 110) is granted in part and denied in part as set forth in PP 11, 12, and 13 hereafter.

11. Defendants' motion for summary judgment (Doc. 110) on the claim that Defendant Shaler Area Education Association's calculation of its fair share fee is required to be verified by an independent auditor is denied.

12. Defendants' motion for summary judgment (Doc. 110) on the claim that Plaintiffs may not be charged for Defendants Pennsylvania State Education Association's and National Education Association's expenditures for litigation which does not involve Plaintiffs' bargaining unit is denied.

13. The Defendants' motion for summary judgment (Doc. 110) on the claim that Plaintiffs may not be charged for Defendants' otherwise chargeable expenditures which involve health care professionals who are also represented by the Defendant Pennsylvania State Education Association is granted.

14. The Clerk of Court shall send a copy of this order to the Hon. Yvette Kane and the Hon. Andrew J. Smyser.

MALCOLM MUIR, U.S. District Judge

MM:ga

FILED July 3, 2000

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

CIVIL NO. 1:CV-96-1233

MARSHA OTTO, F. NAYLOR EMORY, DENNIS A. ERB, ROBERT K. GILBERT, JAMES W. LOSSEL, BARBARA J. MCCALLEY AND WESLEY S. SEMPLE,

Plaintiffs

v.

PENNSYLVANIA STATE EDUCATION ASSOCIATION—NEA, NATIONAL EDUCATION ASSOCIATION, GROVE CITY AREA ASSOCIATION AND SHALER AREA EDUCATION ASSOCIATION,

Defendants

January 28, 1999, Decided
January 28, 1999, Filed

REPORT AND RECOMMENDATION

This civil action was initiated by a complaint filed on July 2, 1996. An amended complaint (Doc. 19) was later filed on August 30, 1996. A case management order was entered in the case on October 22, 1996. Doc. 22.

The action is brought under 42 U.S.C. § 1983, challenging certain of the procedures used by the defendants, who are national, state and local collective bargaining organizations and teachers unions, in collecting "fair share" fees from the plaintiffs, who are union nonmembers.

The Court has stated the background of the case in the Memorandum of January 13, 1997 (Doc. 63), as follows:

> Defendants are affiliated national, state and local teachers' unions. Plaintiffs are seven nonunion public school employees, who challenge certain aspects of Defendants' collection of fair share fees for the 1994-95 and 1995-96 academic years.
>
> The Pennsylvania Fair Share Act, 71 Pa. Stat. § 575 (1990), authorizes public employees' unions to collect fair share fees from nonmembers to help defray the cost of the union's exclusive bargaining representation of all employees. *Id.* § 575(b). Fair share fees are calculated as the dues paid by union members, less the amounts not employed by the union in its role as exclusive representative. *Id.* § 575(a). The fair share fee is thus a percentage of the full fee paid by union members.
>
> Because the mandatory collection of fair share fees from nonmembers represents some degree of impairment of the nonmembers First Amendment rights, the union must provide nonmembers with certain procedural safeguards. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301-03, 106 S. Ct. 1066, 1073-74, 89 L. Ed. 2d 232, 243-45 (1986). The nonmembers has a right to object to any portion of his or her fees being spent on political activities unrelated to the union's duties as exclusive bargaining representative. *Id.* at 301-02, 106 S. Ct. At 1073, 89 L. Ed. 2d at 244. The union must also provide some opportunity for a nonmember who objects to the calculation of the fee to have his or her objections resolved by "a reasonably prompt decision by an impartial decisionmaker." *Id.* at 307, 106 S. Ct. At 1076, 89 L. Ed. 2d at 247.
>
> Each year, Defendants each make a separate calculation of the percentage of their expenses which will be applied to collective bargaining representation. This percentage is then used to determine the fair share fee to be paid by nonmembers. NEA's and PSEA's

> calculations are verified by independent audit, but SAEA's calculations are not.
>
> Nonmembers receive a "Notice to Fair Share Feepayers" each year, detailing the fair share fees and the underlying calculations. (Complaint, ex. A). The Notice provides that nonmembers may challenge [Footnote omitted.] the calculation of the fair share fee, by notifying PSEA in writing. Such disputes are resolved through binding arbitration. (Complaint, ex. A at 18).
>
> Plaintiffs received the Notice to Fair Share Feepayers for the years in question, and paid their fair share fees without invoking the challenge procedure.
>
> Plaintiffs, through their amended complaint, now allege that Defendants have failed to provide all of the required procedural safeguards. Specifically, Plaintiffs allege: (1) that SAEA's failure to have its fair share fee calculations independently audited violates the constitutional limitations on fair share fees; (2) that Defendants' arbitration procedure fails to provide a reasonably prompt resolution of fee disputes by an impartial decisionmaker; and (3) that Defendants' calculation of fair share fees improperly applied fees to union activities not reasonably related to representation.

By the Order of January 13, 1997, the Court dismissed the amended complaint in part, granting the defendant's motion to dismiss the amended complaint as to the plaintiffs' claim that the defendants' arbitration procedure fails to provide a reasonably prompt resolution of fee disputes by an impartial decisionmaker. In an Order filed on June 3, 1997, the Court denied the plaintiffs' motions for the certification of a class of plaintiffs.

Upon the expiration of the deadline as established in the case management order for the parties to exercise their option to elect to consent to proceed in all further proceedings before

a magistrate judge, and upon the parties' failure to notify the Court of their election, a memorandum from the magistrate judge to the District Court Judge was sent recommending that a trial date and pretrial conference date be set by Judge Caldwell. After the entry of a new procedural order, by Judge Caldwell, on September 30, 1999 (Doc. 99), the parties agreed to the stipulated dismissal of all claims in the lawsuit other than the plaintiffs' claims for declaratory and injunctive relief. *See*, Doc. 100. Under the Stipulation, the remaining claims for declaratory and injunctive relief are limited to plaintiffs' contentions that: (a) defendant Shaler Area Education Association's calculation of its fair share fee must be verified by an independent auditor; (b) plaintiff may not be charged for the defendants' expenditures for litigation, even though reasonably employed to implement or to effectuate the duties of the exclusive representative, that does not concern the individual member's bargaining unit; and (c) plaintiffs may not be charged for defendants' expenditures for otherwise chargeable activities involving health care professionals. The parties then filed cross motions for summary judgment on a stipulated set of facts. Shortly after these motions had been filed, and while the case was in an unremanded status before Judge Caldwell, the case was transferred, on December 16, 1997, as a part of case reassignments, upon the entry of a new judge, to Judge Caputo. On November 30, 1998, the case was again reassigned, on the same basis, to Judge Kane. The summary judgment motions were fully briefed in December of 1997, and they are ripe for decision by the Court. By Order of January 11, 1999, the case was remanded to the magistrate judge for a Report and Recommendation addressing the pending motions. This Report and Recommendation addresses the pending motions for summary judgment. The

parties agree that the motions may be decided on the basis of stipulated facts. These stipulated facts are as follows:

A. FACTS RELATING TO THE LOCAL AUDIT ISSUE

1. Defendant Shaler Area Education Association ("SAEA") represents a bargaining unit of approximately 355 teachers and other education professionals. Of these, 344 were members of SAEA, and the remaining 11 were fair-share feepayers during the 1994-95 school year.

2. SAEA is operated as a volunteer organization. It has no employees. Its officers are full-time teachers who conduct the Association's affairs in their free time, although they do receive honoraria for their Association work (which in 1993-94 totaled $ 7,554.00).

3. SAEA's total expenditures for the 1993-94 fiscal year were $ 22,102.00.

4. SAEA's membership dues for the 1994-95 school year were $ 50.00. Its fair-share fee for that year was $ 45.00.

5. SAEA's ledger of income/expenditures for the 1993-94 fiscal year is attached [to the Stipulation].

6. SAEA's calculation of the chargeable and nonchargeable portions of its 1993-94 expenditures and of its fair-share fee for 1994-95 was made by SAEA's then-treasurer, Donald Deets, in accordance with the procedures set out in the Notice to Fair Share Feepayers, the relevant portion of which is attached [to the Stipulation], and PSEA's instructions for preparing the local fair share fee calculation form, attached [to the Stipulation]. The actual calculations

are shown on SAEA's Fair Share Fee Calculation for 1994-95 School Year, attached [to the Stipulation], which was also part of the Notice to Fair Share Feepayers.

7. SAEA's financial statements and its calculations described in paragraph 6 were not verified by an independent auditor.

8. Had SAEA commissioned an independent audit of its financial statements for the 1993-94 fiscal year, the cost to SAEA would have been approximately $ 1,025.00. An affidavit by Certified Public Accountant John P. Lavery setting forth this estimate is attached [to the Stipulation].

9. As a condition for PSEA's administration of the fair-share program on behalf of local associations, SAEA, like other local associations, is required to submit to PSEA's Financial Management Department its Fair-Share Fee Calculation form based on prior-year expenditures, its budget for the current year, and, since 1995-96, a Summary of Chargeable Expense worksheet or similar spreadsheet. The PSEA Financial Management Department verifies the Fair-Share Fee Calculation form for mathematical accuracy, and subtracts a 2% buffer from the local's chargeable percentage to provide an additional safeguard against minor errors that may have occurred. [References to Exhibits omitted.]

10. Each year, all SAEA fair-share feepayers are provided, as part of the Notice to Fair Share Feepayers distributed by PSEA, with an explanation of the procedures by which SAEA's fair-share fees are calculated, SAEA's Fair-Share Fee Calculation form, and SAEA's budget for the current year. [References to Exhibits omitted.]

11. Defendants represent that, beginning with the 1997-98 school year, PSEA's Notice to Fair Share Feepayers will include a statement to the effect that a nonmember who pays a fair share fee to any local association that does not provide an audit of its financial statements will be permitted, on reasonable terms and conditions, to inspect the local association's detail of expenditures that are the basis for its fee calculation, for the purpose of making a determination of whether to challenge the fair share fee assessed by the local association.

B. FACTS RELATING TO EXTRA-UNIT LITIGATION

12. PSEA treats as chargeable to fair-share feepayers represented by SAEA and the Grove City Area Education Association ("GCAEA") the expenditures it incurs for litigation that arises out of the duties of PSEA or its affiliates as exclusive representatives of the bargaining units they represent, whether or not the particular piece of litigation relates specifically to the SAEA and GCAEA bargaining units. This includes, for example, litigation growing out of collective bargaining (including work stoppages), the enforcement or protection of the rights of bargaining unit members under a collective bargaining agreement, unfair labor practice charges, and duty of fair representation claims. It also includes litigation that PSEA or its affiliates prosecute or defend in the interest of maintaining themselves as viable organizations, such as tort and contract litigation, internal labor relations matters, and the like.

13. Litigation papers setting forth the nature of several cases, funded during 1993-94, that provide examples of chargeable litigation related to collective

bargaining and contract administration are attached [to the Stipulation].

14. Examples of "organizational maintenance" litigation, a percentage of which PSEA charges to nonmembers as part of its administrative overhead, would include cases such as (a) a tort action brought by a business invitee injured during an accident at the offices of PSEA or an affiliate; (b) litigation arising out of work performed by a contractor engaged in a construction project for PSEA or an affiliate; and (c) litigation arising out of the employment relationship between PSEA (or an affiliate) and its employees.

C. FACTS RELATING TO EXPENDITURES FOR HEALTH-CARE PROFESSIONALS

15. PSEA's affiliated local associations represent the following types of employees: (a) teachers and other education professionals (103, 712 employees in 608 bargaining units during the 1994-95 school year); (b) educational support personnel (21,391 employees in 371 bargaining units during 1994-95); and (c) health-care professionals, in both the public and private sectors (approximately 1, 548 employees in 6 bargaining units during 1994-95).

16. PSEA provides generally the same kinds of services to all of its affiliated local associations, and to the members of their bargaining units, regardless of which type of employee the local association represents.

17. In calculating its dues percentage that is chargeable to fair-share feepayers, PSEA considers all of its expenditures together, calculating the ratio of all of its chargeable expenditures to all of its expendi-

tures—rather than treating separately, and calculating separate chargeable percentages for, its expenditures attributable to servic provided to educational professionals, educatio l support personnel, and health-care professionals.

D. GENERAL FACTS

18. As part of its calculation of its fair-share fee, PSEA divides its program expenditures into 20 categories of activities, which are treated as either chargeable or nonchargeable. To assist its staff in categorizing their activities, PSEA developed, for each of its divisions, a list of activities typically performed by the division in each of the 20 categories.

Doc. 102. The Stipulation of Facts filed is accompanied by a list of the categories and normally associated activities, and by PSEA's Operating Budget and Fiscal Policy for 1994-1995.

The plaintiffs assert that the defendants have not complied with the constitutional requirements for the collection of agency fees, as that duty is defined under *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 301, 89 L. Ed. 2d 232, 106 S. Ct. 1066 (1986). They assert that defendants have included expenses in the fair share fees charged to nonmembers that are constitutionally proscribed, under *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 528, 114 L. Ed. 2d 572, 111 S. Ct. 1950 (1991).

The plaintiffs assert that they are entitled to judgment as a matter of law on their claim for a declaration that the defendant SAEA, the local association, is required to have its financial disclosure to nonmember "fair share" feepayers verified by an independent auditor. The plaintiffs rely upon *Hudson*, 475 U.S. at 307, n.18, and *Hohe v. Casey*, 727 F. Supp. 163, 166-67 & n.3 (M.D. Pa.1989), final judgment, 136

L.R.R.M. 2198 (M.D.Pa.1990), *aff'd in part, rev'd in part*, 956 F.2d 399 (3d Cir. 1992); accord, *id.* 740 F. Supp. 1092, 1096 (M.D. Pa. 1989). In *Hudson*, the Court said that adequate disclosure to the fair share feepayer surely includes verification by an independent auditor.

The argument of the defendants that an audit of the financial disclosures of the local association is not required is that a small union like SAEA is not required to provide audited financial statements as a precondition for collecting a fair share fee. Citing *Hudson and Abood v. Detroit Bd. Of Educ.*, 431 U.S. 209, 52 L. Ed. 2d 261, 97 S. Ct. 1782 (1977), the defendants note that the objective of the financial disclosure must be to devise a way of preventing compulsory subsidization of ideological activities and programs by employees who object to them ". . . without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities." The defendants make the argument that an "absolutist" application of the requirement for an independent audit in the case of a small local union fails to appropriately allocate or maintain the mandated balance as between the First Amendment interests of the nonmember and the Union's financial needs. The defendants assert that the requirement of an audit would make the collection of any fee prohibitively expensive.

As the defendants acknowledge, an audit provides the highest level of assurance to financial statement users. The assertion of prohibitive expense to an audit is not supported by the stipulated facts.[1] The *Hudson* and *Hohe* decisions require the conclusion that the requirement for verification by an independent auditor is a constitutional requirement despite

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[1] In addition, we are not presented with the basis for the tacit assumption that the auditing costs are not assignable at least in part for purposes of the fair share calculation to the collective bargaining expenses column in the ledger. But we believe that the cost of auditing is immaterial, since it is clearly required as a matter of law.

the financial implications. The purpose of the audit is not to place on the Union the duty to prove its entitlement to the fee that it seeks. The purpose is to permit the feepayer to make an informed decision about whether to challenge the fee. The defendants' concept of a constitutionally compelled requirement that is at the same time a varying requirement, varying as a function of the size of the Union, is not supported by legal authorities or reasonable inferences from authorities. The plaintiffs are entitled to a judgment in their favor on the stipulated facts with respect to the issue whether the defendant SAEA must provide an audited financial statement. The Court should declare that the defendant SAEA must provide to a nonmember a financial statement that has been audited.

The second contention of the plaintiffs in their motion for summary judgment is that nonmembers may not be charged, as the plaintiffs allegedly have been charged by defendants PSEA and NEA, for litigation expenditures incurred in litigation not relating specifically to the plaintiffs' own collective bargaining unit. The plaintiffs rely upon the principal opinion of the Court in *Lehnert v Ferris Faculty Ass'n.*, 500 U.S. 507, 528, 114 L. Ed. 2d 572, 111 S. Ct. 1950 (1991). Justice Blackmun stated it to be the holding of the Court, in this opinion, that extra-unit litigation may not be charged through to a nonmember. Justice Blackmun wrote that extra-unit litigation is "more akin to lobbying in both kind and effect" and that "such activities are not germane to the union's duties as exclusive bargaining representative."

Under *Lehnert*, a state or national union may charge all feepayers for all otherwise chargeable items of the resources that the union makes available to all of its affiliates, regardless of which affiliates use those resources in a given year. The defendants see no reason for treating litigation expenses differently from other expenses. They criticize the view stated by Justice Blackmun on the basis that it fails to

recognize the various types of litigation that the unions typically engage in. They argue that the stated holding of Justice Blackmun is not actually the holding of the Court.

The types of litigation mentioned in the stipulated facts as examples, *supra* at page 8, P B.12, may or may not . . . be more akin to lobbying in kind and effect than activities that are germane to the union's duties as exclusive bargaining representative. Whether this is so or not, it is true that they do constitute extra-unit litigation.

The context of the *Lehnert* decision is to be noted. In *Ellis v. Railway Clerks*, 466 U.S. 435, 453, 104 S. Ct. 1883, 80 L. Ed. 2d 428 (1984), the Court had held that an objecting employee may not be required to share in the expense of litigation unless his or her own bargaining unit is directly concerned. Justice Blackmun in *Lehnert* stated it to be the holding of the Court and the rule of law that the holding in *Ellis* applies in the case of public union members. 500 U.S. at 528. Justice Scalia, concurring in part, reached the same result by application of a different rationale. ("I would hold that contributions can be compelled only for the costs of performing the union's statutory duties as exclusive bargaining agent." 500 U.S. at 550. The United States Court of Appeals for the Sixth Circuit had held that extra-unit litigation expenses could be charged to all feepayers. *Lehnert v. Ferris Faculty Ass'n*, 881 F.2d 1388 (6th Cir. 1989). The Supreme Court in *Lehnert* affirmed in part, reversed in part and remanded for further proceedings consistent with the opinion. 500 U.S. at 532. The parties jointly acknowledge the supremacy and dispositive character of the question whether the Court in *Lehnert* held that extra-unit litigation costs may not be charged of objecting feepayers. We think it to have been the holding of the Court as to the chargeability of extra-unit litigation costs that such costs may not be charged of objecting feepayers. The arguments of the defendants that it is not rational to distinguish litigation expenses on a general and

preclusive scale from other kinds of collective bargaining activities for this purpose do not get reached when the issue has been determined by the United States Supreme Court.

This Court should accordingly declare extra-unit litigation expenses to be precluded from those permissibly chargeable to objecting feepayers and should enjoin the collection from the nonmember plaintiffs of such costs.

The other question is whether expenditures for bargaining units other than those composed of public school employees are chargeable. The stipulated facts are that PSEA does not separately treat, and calculate separately chargeable expenses for, educational professionals (the category into which the plaintiffs here would be placed), expenses for educational support personnel and expenses for health-care professionals. The plaintiffs characterize these other bargaining units as "disparate and unrelated". Invoking *Lehnert*, they assert a right not to be charged for activities relating to the other categories of union members.

The question involving the chargeability of expenditures for bargaining units other than those composed of public school employees is not an issue involving a direct application of a binding precedent such as the litigation expenses issue, where the question involved was whether *Lehnert* is a Supreme Court precedent controlling the disposition of the particular question presented. Here, the question is the highly factual question of relatedness as between bargaining activities and the various employee categories. The plaintiffs find support for their position on this issue in the fact that "there is no showing or mention in the record that negotiations in the private or public hospital health-care professional bargaining unit *directly affected* the results of bargaining in the public school bargaining units, much less Plaintiffs' specific public school bargaining units." Doc. 107, page 16. All that this proposition might support in our view is that there may exist a material question of fact in

dispute that precludes summary judgment on this issue. But the parties here have stipulated to the facts, and have indicated their shared belief that this dispute should be decided on the basis of the stipulated facts.

The burden of proof in a civil action to establish an evidentiary basis to recover is on the plaintiffs, who must establish their right to recover by a preponderance of the evidence. Burdens of proof are relevant to a summary judgment motion brought after discovery is completed by a party without the burden or the theory that the party with the burden lacks adequate evidence to carry the burden. *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

The defendants' position on this issue is the factual-in nature assertion that the availability of the state union's and national union's services provides a benefit to the local bargaining unit and that therefore the expenditures fulfill the Lehnert decision's relatedness requirement.

An audited financial statement of expenditures that shows to a feepayer the amounts expended on behalf of each of the several classifications of represented feepayers would provide the nonmember feepayer a basis to know whether there are expenses being incurred that he or she would choose to challenge on the basis that the expenses do not relate to that feepayer's collective bargaining interests. It would be the best approach to this concern for the state and national associations to indicate by proration those areas of expenses that the association believes to be of general benefit and to charge through to the correct classification(s) of feepayers those expenses that really serve the interests of only the charged classifications. No such delineation of expenses is presented here.

Here, in this litigation, the stipulation is that: *16. PSEA provides generally the same kinds of services to all of its*

affiliated local associations, and to the members of their bargaining units, regardless of which type of employee the local association represents. The plaintiffs can not be deemed to have provided a basis for declaratory or injunctive relief on the basis of this stipulation. Given this factual basis, the correct resolution of the third of these three questions presented for resolution is to grant summary judgment on the question in favor of the defendants.

For the foregoing reasons, it is recommended that plaintiffs' motion for summary judgment be granted in part and denied in part. It is recommended that defendants' motion for summary judgment be granted in part and denied in part. It is recommended that declaratory and injunctive relief be granted in favor of the plaintiff upon their claims relating to the local audit issue and relating to extra-unit litigation. As to the plaintiffs' claim relating to expenditures for health-care professionals, it is recommended that plaintiffs' prayers for declaratory and injunctive relief be denied.

/s/ J. Andrew Smyser
J. Andrew Smyser
Magistrate Judge

Dated: January 28, 1999.

Supreme Court, U.S.
FILED
OCT 3 _ 2003
OFFICE OF THE CLERK

NO. 03-182

IN THE

Supreme Court of the United States

SHALER AREA EDUCATION ASSOCIATION,

Petitioner,

V.

F. NAYLOR EMORY; DENNIS A. ERB;
ROBERT K. GILBERT; JAMES W. LOSSELL;
BARBARA J. MCALLEY; AND WESLEY S. SEMPLE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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October 3, 2003

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. In *Chicago Teachers Union v. Hudson*, this Court held "that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee," and that the "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." 475 U.S. 292, 307 n.18, 310 (1986). Do these holdings require all local unions that force nonmembers to subsidize union activities to provide nonmembers with independently audited financial disclosures?

II. If the answer to Question I is "no," can small local unions satisfy the First Amendment procedural safeguards *Hudson* requires by merely providing nonmembers with an unverified statement of the union's chargeable and non-chargeable expenditures and an invitation for the nonmembers to inspect the union's ledger of expenses?

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Pursuant to Supreme Court Rule 15, Respondents F. Naylor Emory, Dennis A. Erb, Robert K. Gilbert, James W. Lossell, Barbara J. McAlley, and Wesley S. Semple ("Teachers") file this brief in response to the petition for writ of certiorari filed by the Shaler Area Education Association ("SAEA").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Besides the constitutional provision set out in the Petition ("Pet.") at 2, this case involves the Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983 (West Supp. 2000), and the Pennsylvania Fair Share Act, 71 Pa. Stat. § 575. Their pertinent texts are set forth in Appendices ("App.") A at 1a, B at 2a, and C at 3a, respectively.

COUNTER-STATEMENT OF THE CASE

The Teachers do not dispute the facts stated in the Petition's Statement of the Case, (Pet. at 2-5). However, they do disagree with the characterizations and legal conclusions intertwined in that Statement. Moreover, the Statement fails to present all facts material to consideration of the questions presented. The relevant facts omitted from the Statement are presented below.

SAEA's volunteer officers receive an honorarium for their Association work, consisting of 34% of SAEA's annual expenditures. Pet. App. E at 80a (Stipulated Facts). SAEA's unaudited and unverified statement of its prior-year expenditures, broken down into chargeable and non-chargeable categories, is prepared by the SAEA treasurer. *Id.* The Teachers' agency fee, which is based on this

unaudited and unverified calculation, was 90% of full union dues. *Id.* at 77a-78a, 80a-81a; *accord* Pet. App. D at 57a, 63a.

The "invitation to SAEA feepayers to inspect SAEA's ledger of prior-year expenditures on which its fee calculation is based," Pet. at 4, was not made in any of the *Hudson* notices sent during the school years at issue (1994-95 and 1995-96), nor is such an "invitation" in the record. Instead, SAEA represented in the Stipulation of Facts that "beginning with the 1997-98 school year," such an "invitation" would appear in the *Hudson* notice. Pet. App. E at 82a.

RESPONSE TO PETITION

In decisions only weeks apart, the Ninth Circuit in *Harik v. California Teachers Ass'n*, 326 F.3d 1042, 1047-49 (9th Cir.), *petition for cert. filed sub nom. Sheffield v. Aceves*, 72 U.S.L.W. 3105 (July 11, 2003) (No. 03-89), and the Third Circuit in the instant case, *Otto v. Pennsylvania State Education Ass'n-NEA*, 330 F.3d 125, 131-33 (3d Cir.), *petition for cert. filed sub nom. Shaler Area Education Ass'n v. Emory*, 72 U.S.L.W. 3129 (Aug. 01, 2003) (No. 03-182) (Pet. App. A), came to diametrically opposite answers to the questions presented here. *See* Pet. at 5-7, 10-12. Moreover, in its revised opinion, the Third Circuit analyzed and rejected the *Harik* decision. Pet. App. A at 8a-11a.

For the reasons stated in the petition for writ of certiorari and petitioners' reply brief in *Sheffield*, No. 03-89 (filed July 11 & Sept. 25, 2003, respectively), the Teachers agree that the Petition's first question here raises a timely and substantial issue worthy of this Court granting the

petitions in both cases. Together, the first question presented here and the second question presented in *Sheffield* satisfy Supreme Court Rule 10(a) and (c).[1]

Although the Teachers do not object to certiorari being granted on the second question presented in the Petition should certiorari be granted on the first question, the second question does not independently meet the criteria Supreme Court Rule 10 establishes for granting review. There is no conflict among the courts of appeals on the latter question.

Admittedly, the Ninth Circuit–in conflict with the Third Circuit–held that small local unions do not have to conduct formal audits. *Compare Harik*, 326 F.3d at 1047-49 *with Otto*, 330 F.3d at 131-33 (Pet. App. A at 7a-11a). However, both circuits agree that merely inviting non-members to inspect the local union's ledger–as SAEA's second question posits–does not meet *Hudson*'s constitutional requirements:

> [T]he checkbook and canceled checks to which the union provides access are only part of the information required to verify the financial statements; the unions do not provide feepayers access to other financial records, such as bills or inventories. The small local union's practice does not meet the requirement of *Hudson* * * * to provide its feepayers with either the full financial material

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[1] Were there not a split in the circuits, the Teachers would oppose this Petition, because the Third Circuit's decision did **not** "decide[] an important federal question in a way that conflicts with relevant decisions of this Court," Sup. Ct. R. 10(c). Only the Ninth Circuit's decision, subject to the *Sheffield* petition, conflicts with this Court's decisions.

> necessary to verify, or an independently sanctioned verification of, the local union's chargeable and non-chargeable expenditures.

Harik, 326 F.3d at 1049.[2]

---

[2] Only the Indiana Court of Appeals appears to allow a small local union to meet *Hudson*'s audit requirement merely by inviting nonmembers to inspect its ledger. *See Whitley County Teachers Ass'n v. Bauer*, 718 N.E.2d 1181, 1191-92 (Ind. Ct. App. 1999). In contrast, Massachusetts' highest court, like the Third Circuit in this case, held that "there is no exception to *Hudson*'s audit requirement for small local union affiliates." *Wareham Educ. Ass'n v. Labor Rel. Comm'n*, 713 N.E.2d 363, 367-68 (Mass. 1999).

Moreover, the Indiana Court of Appeals based its ruling on two federal district court decisions that already had been reversed or called into question by the respective court of appeals, and failed to mention or discuss the courts of appeals' actions. *See Bauer*, 718 N.E.2d at 1192 (citing *Prescott v. County of El Dorado*, 915 F. Supp. 1080, 1090 (E.D. Cal. 1996), *rev'd in pertinent part*, 177 F.3d 1102, 1106 (9th Cir. 1999 , *vacated* 528 U.S. 1111, *reinstated in pertinent part,* 204 F.3d 984 (9th Cir. 2000)); and *Andrews v. Education Ass'n of Cheshire*, 653 F. Supp. 1373, 1377 (D. Conn.), *aff'd on other grounds*, 829 F.2d 335, 340 n.2 (2d Cir. 1987)). In *Andrews*, the Second Circuit did not decide whether the district court correctly suggested that a small local "might not require an independent auditor," because "the three interlocking organizations in this case do not fall into that category." 829 F.2d at 340 n.2. Like the three interlocking organizations in this case, the three interlocking organizations in *Andrews* were the National Education Association, its state affiliate and a local affiliate. *Compare Andrews*, 829 F.2d at 337 *with Otto*, 330 F.3d at 128-29, 131 n.6 (Pet. App. A at 3a-4a, 9a-10a n.6).

The Teachers object to the unions' assertions concerning the responses that the other affiliated locals of the Pennsylvania State Education Association had during the 2002-03 school year to the injunction, affirmed by the Third Circuit, prohibiting SAEA from collecting fees from the Teachers without providing an independent verification of SAEA's calculation of its fees. *See* Pet. at 8. The "facts" alleged are not matters of record.

In any event, the choice to forego both the audit and the collection of fees is a choice of the unions' own making.[3] As the Third Circuit aptly noted:

> [L]ocal unions are not without options. For example, unions without the financial wherewithal to afford the *Hudson*-required audit might choose to enter into combinations with other small unions to achieve necessary economics of scale. In the alternative, state or national unions might choose to subsidize the cost of local unions' audits.

Otto, 330 F.3d at 135 (Pet. App. A at 15a). The Third Circuit's alternative follows directly from this Court's approval of charging nonmembers for affiliate costs spent on other bargaining units: "The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable **economic**, political, and informational resources **when the local is in need of them.**" *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 523 (1991) (emphasis added).

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[3] "Indeed, the union triggers no disclosure [or audit] requirement until it voluntarily seeks to collect service fees from the non-union members." *Tierney v. City of Toledo*, 824 F.2d 1497, 1503 n.2 (6th Cir. 1987).

Obviously, the Teachers dispute the Petition's arguments on the merits, (Pet. at 15-20). However, because the Teachers agree that certiorari should be granted, they do not here respond in full to those arguments, without waiving their right to respond if certiorari is granted, *see* Sup. Ct. R. 24.[4] We do note that the Third Circuit ably and adequately justified requiring local unions to audit their fee calculations and rejected the Ninth Circuit's approach to this issue:

> [T]he Ninth Circuit shifted the burden of expense verification from the union to the nonmember. * * *
>
> *Harik* acknowledges that "union costs [for verification] do not trump non-members' First Amendment rights," *id.* [326 F.3d at 1049], and thus presumably there is no bye from *Hudson*'s requirement of independent auditor verification. But * * * *Harik* (as already noted) allows the option of providing financial reports (unaudited and, it appears, lacking any independent auditor oversight).* * * In so doing, *Harik* excises "independent auditor" from *Hudson*'s "verification by an independent auditor," 475 U.S. at 307 n.18, at least "[f]or the smallest [union] affiliates." *Harik*, 326 F.3d [at] 1048-49. * * *
>
> * * * We are bound by the Supreme Court's decision in *Hudson*, and its directive of "verification by an independent auditor" means just that.

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[4] The teachers in *Sheffield* (No. 03-89) responded to many of these same "merits" arguments in their reply brief filed on September 25, 2003. To the extent necessary, the Teachers here adopt the *Sheffield* reply.

> *Hudson* implied no intent to make the audit requirement depend on the size of the reporting union.

Otto, 330 F.3d at 131-32 (Pet. App. A at 9a-11a).

When the reason is that this Court has decided an issue, no additional "reasoned justification," Pet. at 15, is needed. When this Court's precedent directly applies, as it does here, that is sufficient reasoned justification. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997).

The Court could, of course, defer consideration of the Petition in this case pending the disposition of the petition in *Sheffield*. However, there is an additional reason for considering both petitions together and granting certiorari in both cases at this time.

Although this case and the second question in *Sheffield* present the same legal question, the consequences of the unaudited local union disclosures on the nonmembers are not the same. In *Sheffield*, the local union's portion of the agency fee is based on the state union's chargeable percentage minus five percent, which is usually less than the chargeable percentage revealed in the local union's unaudited chargeable calculation. *Harik*, 326 F.3d at 1050. SAEA, however, does not use such a "local presumption." SAEA uses the 90% its treasurer calculates in his unverified chargeable statement of SAEA's expenses, not the lower chargeable percentage that the state union's audited statement approves. R. 19 (Amended Complaint, Exhibit A). Consequently, the effect of the local's unverified chargeable calculation is more severe on the Teachers here than on the teachers in *Sheffield*.

CONCLUSION

For the foregoing reasons, the Teachers agree that this Petition for Writ of Certiorari should be granted along with the similar petition on the same issue in *Sheffield* (No. 03-89) (Question II). Accordingly, the Court should conference the two cases together. The Teachers further suggest that, in the event certiorari is granted herein and in No. 03-89, the cases be consolidated for oral argument.[5] Alternatively, the Teachers suggest that the Third Circuit's decision should be summarily affirmed on the questions this Petition presents as consistent with this Court's decision in *Hudson*, and the Ninth Circuit's conflicting decision in *Sheffield* should be summarily reversed as contrary to *Hudson*.

Respectfully submitted,

MILTON L. CHAPPELL*
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ATTORNEYS FOR PETITIONERS
*Counsel of Record

October 3, 2003

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[5]Counsel of record for the respondent Teachers here (No. 03-182) and the teacher petitioners in No. 03-89 is the same.

APPENDIX A

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

UNITED STATES CONSTITUTION
Fourteenth Amendment

Section 1. . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

CIVIL RIGHTS ACT OF 1871, 42 U.S.C. § 1983

CIVIL RIGHTS ACT OF 1871
42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

APPENDIX C

PENNSYLVANIA FAIR SHARE ACT, 71 P.S. §§ 575 (a); (b); (c)

1990

PENNSYLVANIA FAIR SHARE ACT

§ 575. (Adm. Code § 2215). Fair share fee; payroll deduction

(a) As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

* * * *

"**Fair share fee**" shall mean the regular membership dues required of members of the exclusive representative less the cost for the previous fiscal year of its activities or undertakings which were not reasonably employed to implement or effectuate the duties of the employe organization as exclusive representative.

* * * * *

(b) If the provisions of a collective bargaining agreement so provide, each nonmember of a collective bargaining unit shall be required to pay to the exclusive representative a fair share fee.

(c) To implement fair share agreements in accordance with subsection (b), the exclusive representative shall provide the public employer with the name of each nonmember who is obligated to pay a fair share fee, the amount of the fee that he or she is obligated to pay and a reasonable schedule for deducting said amount from the salary or wages of such nonmember. The public employer shall deduct the fee in accordance with said schedule and promptly transmit the amount deducted to the exclusive representative.

* * * *